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The Supreme Court Retires Disparate Impact: *Kentucky Retirement Systems v. EEOC* Validates the Disparate Treatment Theory Under the Age Discrimination In Employment Act

By Molly Horan*

I. INTRODUCTION

Most working Americans will someday reach the age of pension eligibility. At this time the employee is faced with a pivotal question: Should I continue to work or accept my pension and retire? Regardless of the decision made by the employee, Congress has taken steps to ensure that, if the employee chooses to continue working, he will be treated fairly in the workplace. In 1968, the Age Discrimination in Employment Act (ADEA) was signed into effect.¹ The ADEA guarantees older employees the same rights as younger employees in the workplace and prohibits employers from discriminating on the basis of age, when that employee is at least the age of forty.² Specifically, section 623(a)(1) of the ADEA forbids employers from discriminating against individuals with respect to the individual's compensation, terms, conditions, or privileges of employment because of such individual's age.³ Since the enactment

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1. See Rocco Cozza, *Does the Theory of Disparate Liability Apply in Cases Arising Under the Age Discrimination in Employment Act?: A Question of Interpretation*, 41 DUQ. L. REV. 773, 774 (2003).

2. See *id.*

3. See 29 U.S.C. § 623(a)(1) (2006) ("It shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate

of section 623 of the ADEA, the Supreme Court of the United States, as well as lower courts, have struggled to agree on a method of interpreting claims brought by employees under the ADEA.⁴ Two theories of liability serve as the focus of this struggle: disparate treatment and disparate impact.⁵ Under a disparate treatment theory, the employee has the burden of showing that the employer's decision or policy was actually motivated by age.⁶ Thus, under a disparate treatment theory of liability, "[p]roof of discriminatory motive is critical."⁷ In contrast, claims brought under the disparate impact theory involve employment practices or policies which are facially neutral, but treat one group in a different and more negative manner than another.⁸ For claims under a disparate impact theory, proof of discriminatory motive is not required.⁹ The language of the ADEA makes it difficult to discern which theory of liability is applicable for claims of ADEA violations.¹⁰ As a result, courts, including the Supreme Court, have applied the two intermittently and inconsistently. In previous cases, the Supreme Court muddled the debate further by issuing holdings in which *both* theories of liability were found applicable.¹¹ Similarly, in each of the Supreme Court's most prominent and decisive ADEA cases addressing the issue of which theory of liability should be applied, the Court issued its

against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . .").

4. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993).

5. See *id.*

6. See *id.*

7. *Id.* (quoting *Teamsters v. United States*, 431 U.S. 324, 335-36, n.15 (1977)).

8. *Hazen Paper*, 507 U.S. at 609.

9. *Id.*

10. See RAYMOND F. GREGORY, *AGE DISCRIMINATION IN THE AMERICAN WORKPLACE: OLD AT A YOUNG AGE* 19 (2001).

11. In *Smith v. City of Jackson*, the Court employed a disparate impact theory of liability and in *Hazen Paper* the Court applied the disparate treatment theory. See Jessica Sturgeon, *Smith v. City of Jackson: Setting an Unreasonable Standard*, 56 DUKE L.J. 1377, 1385-89 (2007). Furthermore, in *Hazen Paper* (the decision of which was issued prior to that of *Smith*), the Court refused to rule as to whether a disparate impact theory of liability is available under the ADEA. *Hazen Paper*, 507 U.S. at 610.

opinion without explanation or guidance as to how future courts should interpret that opinion.¹²

In *Kentucky Retirement Systems v. EEOC*, the Supreme Court was afforded the opportunity to clarify, once and for all, which theory of liability should be applied to ADEA claims. In *Kentucky Retirement*, the Equal Employment Opportunity Commission (EEOC) brought forward an action on behalf of Charles Lickteig, a sixty-one year old hazardous worker who became disabled while employed.¹³ Because Lickteig continued to work after becoming eligible for retirement, he was not eligible to collect “disability

12. In *Hazen Paper*, the Court asserted that it “had never decided whether disparate impact claims were available under the ADEA.” Sturgeon, *supra* note 11, at 1385. After making this determination, the Court failed to analyze when and where a disparate impact theory would be available and simply left the issue moot. *See id.* Furthermore, in *Hazen Paper* the court adopted a disparate treatment theory of analysis but only because the employee alleged that the employer’s conduct was motivated by age. *See id.* In *Smith*, the Court reasoned that a disparate impact theory of liability might be available for claims of ADEA violations. *Id.* at 1387-88. The Court, however, dismissed the employee’s disparate impact claim and failed to explain when a disparate impact claim of an ADEA violation would succeed and be upheld by the Court. *See id.*

13. *See* Ky. Ret. Sys. v. EEOC, 128 S. Ct. 2361, 2365 (2008). The EEOC is a federal agency charged with the enforcement of laws designed to prevent discrimination in the workplace. *See* The U.S. Equal Employment Opportunity Commission, Federal Equal Employment Opportunity Laws, http://www.eeoc.gov/abouteeo/overview_laws.html (last visited Feb. 10, 2009). The primary federal laws prohibiting job discrimination are: Title VII of the Civil Rights Act of 1964, Equal Pay Act of 1963, Age Discrimination in Employment Act, Title I and Title V of the Americans with Disabilities Act of 1990, Sections 501 and 505 of the Rehabilitation Act of 1973, and the Civil Rights Act of 1991. *Id.* The EEOC receives and handles a large number of age discrimination (ADEA) claims each year. *See* The U.S. Equal Employment Opportunity Commission, Age Discrimination, <http://www.eeoc.gov/types/age.html> (last visited Feb. 10, 2009). For example, in 2007, the EEOC received 19,103 charges of age discrimination, resolved 16,134 charges, and recovered 66.8 million dollars in monetary benefits for charging parties and aggrieved individuals. *Id.* To file a claim with the EEOC alleging a violation of the ADEA, an individual must file a charge with the EEOC. *See* The U.S. Equal Employment Opportunity Commission, Filing a Charge of Employment Discrimination, http://www.eeoc.gov/charge/overview_charge_filing.html (last visited Feb. 10, 2009). A charge must be filed with the EEOC before a private lawsuit can be filed in court. *Id.* Additionally, the individual alleging the violation must file the charge within 180 days from the date of the alleged violation. *Id.*

retirement” as a younger, non-pension eligible worker would be under Kentucky’s retirement system.¹⁴ The Supreme Court was thus charged with determining whether the Kentucky retirement system prohibiting Lickteig from collecting “disability retirement” violated the ADEA.¹⁵ In determining whether the Kentucky retirement system violated the ADEA, the Supreme Court had the opportunity to make sense of the conflicting series of precedent set forth by previous disparate impact/disparate treatment cases.¹⁶ When issuing its holding in *Kentucky Retirement*, the Court sought to limit its holding perhaps in an attempt to avoid limiting the availability of a disparate impact theory in future cases involving an alleged violation of the ADEA.¹⁷ Because the policy in question in *Kentucky Retirement* was facially discriminatory and the Court upheld its validity, the Court certified the disparate treatment theory of liability as supreme.¹⁸

This case note explores the ramifications and effectiveness of the *Kentucky Retirement* decision. Part II discusses the historical background, progression, and development of the ADEA, as well as the theories used to analyze claims under the Act. Part III outlines the operative facts of *Kentucky Retirement*. Part IV dissects and analyzes the opinions of the majority and dissent. Part V examines the potential impact the Court’s decision in *Kentucky Retirement* will

14. *Ky. Ret.*, 128 S. Ct. at 2365.

15. *See id.* at 2364. (“The question before us is whether Kentucky’s system consequently discriminates against the latter workers ‘because of . . . age.’”).

16. *See, e.g. Hazen Paper*, 507 U.S. at 604; *Smith v. City of Jackson*, 544 U.S. 228 (2005); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

17. *Ky. Ret.*, 128 S. Ct. at 2376.

18. In his dissent, Justice Kennedy states that Kentucky’s retirement system is facially discriminatory because, on its face, it treats employees differently based on age. *See Ky. Ret.*, 128 S. Ct. at 2372 (Kennedy, J., dissenting). He specifically writes, “[b]y explicit command of Kentucky’s disability plan age is an express disadvantage in calculating the disability payment.” *Id.* Justice Kennedy further notes that previously, in accordance with the disparate impact theory, “once the plaintiff establishes that a policy discriminates on its face, no additional proof of a less-than-benign motive for the challenged employment action is required.” *Id.* at 2374-75. Thus, if the Court upholds a facially discriminatory policy, like Kentucky’s retirement system, it simultaneously invalidates the use of disparate impact and advocates the use of disparate treatment.

have on employees, employers, and the judicial system. Finally, Part VI concludes this case note.

II. HISTORICAL BACKGROUND

The first legislation to outlaw age discrimination in the workplace was enacted by the states.¹⁹ Colorado was the first state to enact anti-age discrimination legislation in 1903 followed by Massachusetts (1937), New York (1958), Connecticut (1959), Wisconsin (1959), and California (1961) among several others.²⁰ With so many states eager to enact statutes barring age discrimination in the workplace, why did it take federal legislators so long to enact a similar statute? Legislation outlawing age discrimination largely lacked public support.²¹ Such legislation often adversely affected younger workers and similarly, because it only benefitted a select segment of workers, many believed it was not relevant or important.²² Based on the lack of public support, Congress was hesitant to enact legislation that would punish employers from discriminating based upon age.

Title VII of the Civil Rights Act of 1964 served as the first major step in ending workplace discrimination on a national level. Title VII specifically prohibits employers from discriminating based upon race, color, religion, sex, or national origin.²³ Title VII, however, lacks any mention of age, thus leaving employers free to discriminate in the workplace based upon the ages of their employees.²⁴ As a result of this exclusion and after sensing the need for investigation, the final version of Title VII directed the secretary of labor to

19. See GREGORY, *supra* note 10, at 16.

20. See *id.*

21. See *id.*

22. See *id.* Much of the public believed that because there were many other programs for the elderly (including Social Security, Medicare, and Medicaid), there was no need to protect them in the workplace any more than they already were. *Id.* Furthermore, because these existing programs benefitted not only the elderly but also their families (children, spouses, grandchildren, etc.), there was little controversy surrounding them. *Id.* Age discrimination statutes, however, only benefitted the elderly worker, and because of this, many younger workers did not support such limited legislation. *Id.* at 17.

23. See Cozza, *supra* note 1, at 774.

24. See *id.*

conduct a study of factors relating to age discrimination and its consequences.²⁵

Secretary of Labor, W. Willard Wirtz, released his findings one year later setting forth five basic conclusions:

1. Many employers adopt specific age limits upon those they will employ.
2. These age limitations markedly affect rights and opportunities of older workers.
3. Although age discrimination rarely is based on the sort of animus that motivates racial, national origin, or religious discrimination, it is based upon stereotypical assumptions of the abilities of the aged, unsupported by objective facts.
4. The evidence available at the time showed that the arbitrary removal of older workers from the workplace was generally unfounded, and that, overall, the performance of the older worker was at least as good as that of the younger worker.
5. Age discrimination is profoundly harmful in that it deprives the national economy of the productive labor of millions of workers and substantially increases the costs of both unemployment insurance and Social Security benefits, and it inflicts economic and psychological injury upon workers deprived of the opportunity to engage in productive and satisfying occupations.²⁶

25. *See id.*

26. *See id.* at 774-75. The study conducted by Wirtz focused primarily on the common employer practice of setting age limits on the hiring process. *See* GREGORY, *supra* note 10, at 18. "Thus, the original impetus for the enactment of a federal statute barring age discrimination in employment emerged from discriminatory hiring practices . . . rather than from discriminatory terminations or retirements of older workers." *Id.* Born in 1912, W. Willard Wirtz served as U.S. Secretary of Labor from 1962-1969. John F. Kennedy Presidential Library & Museum, Biographies & Profiles: Willard Wirtz, <http://www.jfklibrary.org/Historical+Resources/Biographies+and+Profiles/Profiles/Willard+Wirtz.htm> (last visited Mar. 24, 2009). During his time as Secretary of Labor, Wirtz became "best known for his work toward ending and preventing several strikes, and for his involvement in controversial railroad negotiations." *Id.* Furthermore, Wirtz "supported job-retraining programs as a way to combat unemployment, and proposed amendments such as the Manpower Development and Retraining Act." *Id.* During his lifetime, Wirtz worked as a high school teacher (1933-1934), an assistant professor of law at Northwestern University (1939-1952), Assistant General Counsel of Board of Economic Welfare (1942-

A congressional committee concurred with Wirtz's findings and in 1967 President Johnson signed the ADEA, which became effective June 12, 1968.²⁷ The newly adopted ADEA expanded Title VII of the Civil Rights Act of 1964 "in Congress's continuing effort to eradicate discrimination in the workplace."²⁸ Congress intended for the ADEA "to promote employment opportunities for older workers" by requiring employers to make decisions based not upon the age of workers, but upon their capabilities and job performance.²⁹

The ADEA makes it illegal for an employer to fire, refuse to hire, or take any other adverse action against an employee because of that employee's age.³⁰ In particular, section 623(a)(1) of the ADEA, the section at issue in *Kentucky Retirement*, forbids an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."³¹ Since it became effective in 1968, the ADEA has been the basis for many age discrimination lawsuits.³² Interpreting the act, however, has not been an easy task for the courts. Specifically, the ambiguous language of the ADEA, and the ambiguity surrounding its development, have led to much confusion among the courts and have led them to interpret section 623 according to two competing methods: (1) disparate impact theory

1943), Associate with the War Labor Board (1943-1945), Chairman of the National Wage Stabilization Board (1946), a law professor at Northwestern University (1946-1954), U.S. Secretary of Labor (1962-1969), and a partner at Wirtz & Gentry in Washington D.C. (1970-1978). *Id.* His many accomplishments and experiences have given him two decades of experience in labor law, "including hundreds of labor management disputes." *Id.* Currently, Wirtz resides in Washington D.C. *Id.*

27. Cozza, *supra* note 1, at 775. In its concurrence with Wirtz, the congressional committee "affirmed Wirtz's conclusions that 'employers generally operated under false assumptions regarding the effects of aging in order workers, that these assumptions led to the common usage of age barriers in the hiring process and, consequently, that a disproportionate number of older workers were among the unemployed.'" *Id.* (citing GREGORY, *supra* note 10, at 18).

28. GREGORY, *supra* note 10, at 18.

29. *Id.* at 19.

30. *See id.*

31. 29 U.S.C. § 623(a)(1) (2006).

32. *See* GREGORY, *supra* note 10, at 21.

of liability; and (2) disparate treatment theory of liability.³³ However, before investigating the courts' uneven applications of the two methods of interpreting the ADEA, it is necessary to determine exactly why courts are so perplexed with the objectives and scope of the ADEA.

A. Sources of Ambiguity in the ADEA

1. The Language of the ADEA

As previously mentioned, the language of the ADEA, specifically section 623, is ambiguous. This ambiguity causes courts to cast conflicting decisions on very similar issues. An examination of the language of section 623 seems to indicate that the prohibitions in the statute are directed only at intentional age discrimination.³⁴ "The 'because of such individual's age' language modifies both prohibitions [contained in section 623 and] implies that age must be the motivating factor for the employer's practice" ³⁵ Thus, under this interpretation of the statute's language an employer would have to take action against an employee based on the employee's age in order to violate the ADEA, which essentially requires intentionally violating the ADEA.³⁶ Others, however, have argued that this is not

33. See George O. Luce, *Why Disparate Impact Claims Should Not be Allowed Under the Federal Employer Provisions of the ADEA*, 99 NW. U.L. REV. 437, 441-43 (2004).

34. *Id.* at 442.

35. *Id.* (citing 29 U.S.C. § 623(a)(1) (2006)). Section 623 contains two major prohibitions: It makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age" and it makes it unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's age" See Luce, *supra* note 33, at 442 (citing 29 U.S.C. § 623(a)(1)). It is thus alleged that the "because of such individual's age" language applies to both of these prohibitions. See Luce, *supra* note 33, at 442 (citing 29 U.S.C. § 623(a)(1)). This would thus make it necessary for an employer to have taken actions in violation of the ADEA with the intent to discriminate. See Luce, *supra* note 33, at 442.

36. See *id.* at 441-43. Intentional age discrimination is known as disparate treatment discrimination. See *id.* at 442. Under the disparate treatment theory of liability, discrimination will be found only if the employer was motivated by age in

the correct reading of the statute.³⁷ These commentators have argued that the language in the statute can be easily read to prohibit facially age-neutral employment practices that adversely affect one age group over another.³⁸ “For example, the ‘otherwise discriminate’ language of § 623(a)(1) . . . seem[s] at first blush to ban certain practices regardless of the existence of any discriminatory intent.”³⁹ Because the statute can be interpreted to ban intentional discrimination as well as actions that are facially neutral but have a discriminatory effect, courts have interpreted the statutes unevenly, applying both interpretations to cases with very similar facts.

In addition to the language of section 623(a) of the ADEA, the language and existence of section 623(f) has similarly given courts pause. Section 623(f), also known as the reasonable factor other than age exception (RFOA), which is specifically found in section 623(f)(1) states: “It shall not be unlawful for an employer . . . to take any action otherwise prohibited under subsections (a), (b), (c), or (e) . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age . . .”⁴⁰ The inclusion of this exception in the ADEA has led courts and commentators to reach two very opposite conclusions. On one side, authors and commentators have suggested that this RFOA exception could be viewed as superfluous if the ADEA were limited to “intentional, age-motivated decisions” since those decisions could not be for any reason other than age.⁴¹ Thus, under this interpretation, the disparate treatment theory of liability would render section 623(f)(1) redundant leaving the disparate impact theory of liability the only viable method of evaluating and determining the

making his decision. Keith R. Fentonmiller, *The Continuing Validity of Disparate Impact Analysis for Federal-Section Age Discrimination Claims*, 47 AM. U. L. REV. 1071, 1075-77 (1998).

37. Luce, *supra* note 33, at 442.

38. *Id.* at 443.

39. *Id.* (citing 29 U.S.C. §623(a)(1) (2006)).

40. *Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395, 2400 (2008) (citing 29 U.S.C. § 623(f)(1) (2006)).

41. BARBARA T. LINDEMANN & DAVID D. KADUE, *AGE DISCRIMINATION IN EMPLOYMENT LAW* 422 (2003).

outcome of an ADEA age discrimination claim.⁴² Others have suggested, however, that through the inclusion of the RFOA exception, Congress limited the ADEA to intentional discrimination, “because the RFOA protects all employment practices except those based on age bias—and this would necessarily include facially neutral criteria even if they had a disproportionately adverse impact on older workers.”⁴³ This interpretation is further based upon the fact that business decisions that negatively impact older workers will be based on reasonable factors other than age, and thus subject to the RFOA exception, because if they were not based on other factors, the decision would be based on age and would violate the ADEA under a disparate treatment analysis as well.⁴⁴ Based upon the indefinite language of the RFOA exception and its ability to be interpreted in two adverse ways, lower courts have employed both the disparate impact theory and the disparate treatment theory with frequent irregularity.

2. Vague Recommendations and Findings

Another cause for confusion stems from Secretary of Labor Wirtz’s investigations and his subsequent recommendations to Congress.⁴⁵ Wirtz recommended that Congress prohibit “arbitrary” discrimination but failed to explain what scope he intended to give the term “arbitrary.”⁴⁶ Although he seemed to equate “arbitrary discrimination” with intentional age discrimination, he also found that “age discrimination” could exist if employment actions were taken based upon age-correlated factors as opposed to age itself.⁴⁷ Thus, if Wirtz intended for the term “arbitrary” to encompass discrimination that was not specifically motivated by age, then the disparate impact theory would be valid.⁴⁸ If, however, his use of the term “arbitrary” was intended to exclude all discrimination that was

42. *See id.*

43. *Id.*

44. Cozza, *supra* note 1, at 793.

45. Luce, *supra* note 33, at 460.

46. *Id.*

47. *Id.*

48. *Id.* at 461.

not motivated by age, then use of the disparate treatment theory would be necessary.⁴⁹

B. Which Theory of Liability to Apply? Disparate Treatment or Disparate Impact?

Since there is uncertainty about which theory of liability to apply, courts, including the Supreme Court of the United States, have applied both rather inconsistently. Because they believe that the language of the ADEA parallels that of Title VII, the Second, Eighth, and Ninth Circuits have generally found that disparate impact claims should be available under the ADEA.⁵⁰ Conversely, the First, Third, Sixth, Seventh, and Tenth Circuits have questioned the viability of disparate impact claims being applied to ADEA violations.⁵¹ The lower circuit courts are not the only judicial entities perplexed by this issue—through its case precedent, the Supreme Court of the United States has similarly demonstrated uncertainty in knowing whether the disparate impact or disparate treatment theory of liability is applicable under the ADEA.⁵²

When the employee alleges that the employer intended to discriminate, courts follow the precedent established in *McDonnell Douglas Corp. v. Green* with little disagreement.⁵³ In *McDonnell Douglas*, Green claimed that petitioner McDonnell Douglas Corporation violated Title VII by discharging him for reasons allegedly motivated by race.⁵⁴ Following the discharge, Green engaged in a number of protests directed at McDonnell Douglas.⁵⁵ A short time later, McDonnell Douglas advertised for a job position in

49. *Id.*

50. Cozza, *supra* note 1, at 773.

51. *Id.*

52. Joseph A. Seiner, *Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach*, 25 YALE L. & POL'Y REV. 95, 111 (2006).

53. *See* Luce, *supra* note 33, at 440.

54. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 794 (1973). McDonnell Douglas asserted that Green was discharged as part of a general reduction in work-force. *Id.*

55. *Id.* at 794-95.

mechanics, Green's trade.⁵⁶ However, when Green applied for re-employment, McDonnell Douglas turned him down based upon his involvement in the protests.⁵⁷ Green filed a complaint with the EEOC alleging that McDonnell Douglas refused to rehire him based on his race, which was a blatant violation of Title VII of the Civil Rights Act of 1964.⁵⁸ In order to address this allegation of intentional discrimination and determine liability, the Court developed a burden-shifting procedure.⁵⁹ First, the complainant in a Title VII trial must carry the initial burden of establishing a prima facie case of racial discrimination.⁶⁰ Once the complainant meets his burden, the burden shifts to the employer and the employer must show "some legitimate, nondiscriminatory reason for the employee's rejection."⁶¹ If the employer meets this burden, the complainant then has the burden of showing that the employer's explanation is pretextual.⁶² Since its date of decision, *McDonnell Douglas* has governed cases involving intentional discrimination, including cases involving violations of the ADEA.⁶³ Consequently, all federal courts have essentially adopted the *McDonnell Douglas* framework for claims of disparate treatment that are not based on direct evidence of

56. *Id.* at 796.

57. *Id.*

58. *Id.*

59. Luce, *supra* note 33, at 439.

60. *McDonnell Douglas*, 411 U.S. at 802. The Court explains that:

[t]his may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id.

61. *Id.* at 802.

62. *Id.* at 804. The Court explains that Title VII does not permit the employer to use the complainant's race, gender, conduct, etc. as a pretext for discrimination. *Id.* Thus, in *McDonnell Douglas*, Green had the burden of showing that McDonnell Douglas used his involvement in the protests, in addition to his race, as a pretext for their rejection of his employment application. *See id.*

63. Luce, *supra* note 33, at 440. The disparate treatment theory of liability established in *McDonnell Douglas* "has been widely accepted without controversy in the ADEA context." *Id.*

discriminatory intent.⁶⁴ However, when it is not actually alleged that the employer intended to discriminate, or when a facially neutral employment practice or policy is at issue, precedent is significantly more muddled due to the Supreme Court's irregular application of disparate impact and the disparate treatment theories.

While courts have applied the disparate treatment theory of liability analyzed in *McDonnell Douglas* to ADEA cases in which intentional discrimination has been alleged, they are hesitant to extend disparate treatment where a facially neutral employment policy is at issue. This hesitancy largely stems from the precedent established in the Supreme Court case, *Griggs v. Duke Power Co.*. Similar to *McDonnell Douglas*, *Griggs* involves a class action wherein a number of black employees alleged that an employment policy created by Duke Power Company violated Title VII.⁶⁵ The employment policy in dispute required employees to have either obtained a high school education or passed a standardized intelligence test.⁶⁶ To determine the outcome of this case the Court followed the disparate impact theory of liability noting that "[t]he Act⁶⁷ proscribes not only overt discrimination but also *practices that are fair in form, but discriminatory in operation.*"⁶⁸ Thus, the majority held that the testing requirements violated Title VII even though the policy was neutral and no discriminatory intent was found.⁶⁹ Following the holding in *Griggs*, many courts, as well as the Supreme Court, have allowed disparate impact claims to be

64. See Crone and Mason PLC, *McDonnell Douglas v. Green* (Standard for Proving Discrimination), <http://www.agerights.com/cases/ussupremecourt/green.html> (last visited Feb. 11, 2009). The *McDonnell Douglas* framework essentially establishes the burden shifting procedure courts use to determine if a violation occurred. See *id.* First, the plaintiff must establish a prima facie case for discrimination. *Id.* Next, if the plaintiff can establish a prima facie case, the burden shifts to the employer to "articulate a legitimate, non-discriminatory reason why the employee was rejected." *Id.*

65. *Griggs v. Duke Power Co.*, 401 U.S. 424, 425-26 (1971).

66. *Id.* at 426.

67. Referring to the Civil Rights Act of 1964.

68. *Griggs*, 401 U.S. at 431 (emphasis added).

69. See *id.* at 436; see also Cozza, *supra* note 1, at 780.

brought under the ADEA.⁷⁰ The Second Circuit was the first to apply the disparate impact theory of liability to an ADEA violation and since that application, courts have argued over whether or not Congress, in its enactment of the ADEA, intended for claimants to recover in the absence of discriminatory intent.⁷¹

The seminal case that caused a large number of circuit courts to “disavow” the disparate impact theory of liability as applied in the ADEA context was the Supreme Court case, *Hazen Paper Co. v. Biggins*.⁷² In *Hazen Paper*, the plaintiff was fired immediately before his pension would have vested, which he claimed motivated his employer to terminate him.⁷³ In deciding whether Hazen Paper violated the ADEA, the Court engaged in an examination of the viability of both disparate impact and disparate treatment claims under the ADEA.⁷⁴ The Court arrived at the conclusion that “[t]he disparate treatment theory is of course available under the ADEA, as the language of [the] statute makes clear.”⁷⁵ The Court further explained that disparate treatment encompasses the “essence” of what Congress intended to prohibit through the ADEA.⁷⁶ This is because when the employer’s decision is totally motivated by factors other than age, the problem of stereotypes based on age disappears, which is the goal of the ADEA.⁷⁷ Following its praise and explanation of the applicability of disparate treatment liability to the ADEA, the Court confused matters by refusing to state that disparate treatment

70. See Cozza, *supra* note 1, at 780. Application of the disparate impact theory of liability is extended to ADEA claims on the basis of the similarity between Title VII’s language and the ADEA’s language. *Id.*

71. See *id.*

72. Luce, *supra* note 33, at 470.

73. *Hazen Paper*, 507 U.S. at 606. Hazen Paper claimed the plaintiff was fired for doing business with competitors. *Id.*

74. *Id.* at 609.

75. *Id.* The language the Court referred to the phrase, “because of such individual’s age,” which appears in Section 623(a)(1) of the ADEA. *Id.* (citing 29 U.S.C. § 623(a)(1) (2006)).

76. *Hazen Paper*, 507 U.S. at 610.

77. *Id.* at 611. The Court explained that this was true even when the motivating factor correlated with age, as pension status typically does. *Id.*

was the only theory of liability that could be applied to the ADEA.⁷⁸ Because the Court refused to rule on the applicability of disparate impact liability, lower courts are still left questioning whether or not disparate impact does in fact apply in the ADEA context.⁷⁹

Rather than expanding their examination of the applicability of ADEA disparate treatment claims, the Supreme Court further obfuscated the matter by applying disparate impact liability in a subsequent case, *Smith v. City of Jackson*.⁸⁰ In *Smith*, the plaintiffs alleged a violation of the ADEA after the City of Jackson revised an employee payment plan which granted raises to police and public safety officers and resulted in older, higher ranking officers receiving raises based on lower percentages of their salaries than younger workers.⁸¹ While the Court in *Hazen Paper* determined that the language of the ADEA clearly made disparate treatment available, the Court in *Smith* concluded that “the ADEA authorizes recovery in disparate-impact cases comparable to *Griggs*” because the language of the ADEA and Title VII is “identical,” except for the substitution of age for race, color, religion, sex, and national origin.⁸² The Court

78. *Id.* at 610. The Court explains: “we have never decided whether a disparate impact theory of liability is available under the ADEA . . . and we need not do so here.” *Id.*

79. See Luce, *supra* note 33, at 472-73. Since *Hazen Paper*, the circuit courts have split. *Id.* Five circuits have interpreted the *Hazen Paper* decision to mean that discriminatory intent *is* required and have disallowed disparate impact ADEA claims. *Id.* In addition, two other circuits have precluded disparate impact claims without barring them. *Id.* at 473. However, three circuit courts still accept disparate impact claims under the ADEA but they do so with little analysis. *Id.*

80. *Smith v. City of Jackson*, 544 U.S. 228 (2005). The Court in *Smith* affirmed the Fifth Circuit’s ruling that the plaintiffs would be entitled to relief under *Griggs*. *Id.*

81. *Id.* at 233. In *Smith*, the Court ultimately found that, under the disparate impact theory of liability, the policy did violate the ADEA. *Id.* at 243.

82. *Id.* at 234. In *Hazen Paper*, the Court specifically stated that the language of the ADEA makes disparate treatment available. *Hazen Paper*, 507 U.S. at 609. The Court went on to state that “[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA.” *Id.* at 610. The Court, however, in *Smith* explained that “when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.” *Smith*, 125 S. Ct. at 1541. Because the Court in *Hazen Paper* said the language of the ADEA makes disparate treatment cases viable and then in *Smith* says the language (and its similarity to Title VII) makes disparate

further ignored the precedent established in *Hazen Paper* and emphasized “that Congress had ‘directed the thrust of the Act to the consequences of employment practices, not simply the motivation.’”⁸³ Clearly noticing the disparity between the holding in *Smith* and that in *Hazen Paper*, the Court explained that because they did not rule on the applicability of disparate impact liability for ADEA claims in *Hazen Paper*, there was nothing in the *Hazen Paper* ruling precluding “an interpretation of the ADEA that parallels [the] holding in *Griggs*.”⁸⁴ The decision in *Smith* contrasts starkly with the holding of *Hazen Paper*.⁸⁵ Furthermore, “[t]he *Smith* decision marks a new height of uncertainty and confusion in disparate impact law.”⁸⁶ The Court’s decision in *Smith* simply illustrated the point that more than thirty years after *Griggs* and *McDonnell*, the Supreme Court still did not understand how and when to apply either the disparate impact theory or the disparate treatment theory.⁸⁷

Smith presented the Supreme Court with an opportunity to clarify the proper theory of liability that should be applied to violations of the ADEA.⁸⁸ The Court, however, simply encumbered the issue further and again left precedent uncertain and vague and the issue undecided.⁸⁹

impact cases viable, the issue of whether disparate treatment or disparate impact should be employed has yet to be determined. Furthermore, by proffering explanations and reasoning to support the viability of both distinct types of cases, the Supreme Court contradicted itself.

83. *Smith*, 544 U.S. at 234 (quoting *Griggs*, 401 U.S. at 432). Departing from the reasoning of the majority, Justice O’Connor, although concurring in the judgment, disagreed with the majority’s interpretation of the ADEA. Sturgeon, *supra* note 11, at 1392. O’Connor examined the ADEA’s text, purpose, and legislative history and reached the conclusion that the ADEA does not allow for recovery based on a disparate impact theory of liability. *Id.*

84. *Smith*, 544 U.S. at 238.

85. See Seiner, *supra* note 52, at 115.

86. *Id.*

87. *Id.*

88. *Id.* at 113-14.

89. See *id.* at 114.

III. FACTS

A. Background and Details of the Kentucky Retirement Plan for Hazardous Workers

Kentucky Retirement Systems developed and, prior to this case, enforced a special retirement plan for state and county employees occupying “hazardous positions.”⁹⁰ Ordinarily, under this plan, a hazardous worker can receive normal retirement benefits by following one of two routes.⁹¹ The first route makes a worker eligible for retirement after twenty years of service while the second allows a worker to become eligible after only five years of service so long as the employee has attained the age of fifty-five.⁹² In order to determine retirement benefits under either of these two normal routes, Kentucky multiplies the worker’s total years of service by 2.5% and then multiplies this figure by the final pre-retirement pay.⁹³ If, however, a hazardous worker becomes disabled or injured prior to becoming eligible for retirement under one of the aforementioned normal routes, the Kentucky retirement plan (Plan) has special provisions.⁹⁴ If an employee has worked for five years or has become disabled while working, then the employee is eligible to retire immediately.⁹⁵ In calculating the retirement pay given to the disabled worker, Kentucky uses a slightly different method than the one applied to the two normal retirement routes.⁹⁶ Kentucky calculates retirement benefits for disabled workers by adding a certain number of years, or “imputed” years, to the employee’s actual number of years of service.⁹⁷ These imputed years will equal the number of years it would have taken the disabled worker to become

90. *Ky. Ret.*, 128 S. Ct. at 2364. Hazardous positions include active duty law enforcement officers, firefighters, paramedics, and workers in correctional systems. *Id.* at 2364-65 (citing KY. REV. STAT. ANN. § 61.592(1)(a) (LexisNexis Supp. 2003)).

91. *Ky. Ret.*, 128 S. Ct. at 2364-65.

92. *Id.* at 2365.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

eligible for normal retirement under either of the aforementioned normal routes of retirement.⁹⁸ The Plan does impose restrictions on the number of imputed years that can be added to a disabled worker's actual years of service.⁹⁹ The Plan establishes a "ceiling" on the imputed years, requiring them to be equal to or less than the number of years the employee has previously worked.¹⁰⁰

B. Charles Lickteig's Alleged Age Discrimination

The EEOC brought an age discrimination lawsuit against Kentucky following a complaint they received from Charles Lickteig.¹⁰¹ Lickteig served as a hazardous position worker at the Jefferson County Sheriff's Department in Kentucky.¹⁰² At the age of fifty-five, he became eligible for retirement but continued to work.¹⁰³ At sixty-one, Lickteig became disabled and retired.¹⁰⁴ In calculating Lickteig's retirement, the Plan calculated his pension on the basis of his actual years of service, which was eighteen years, multiplied by 2.5% and by his final annual pay.¹⁰⁵ The Plan did not add any imputed years to the calculation, however, because Lickteig became disabled after he became eligible for normal retirement benefits.¹⁰⁶ Following the calculation of his pension, Lickteig complained to the EEOC of age discrimination in violation of section 623 of the ADEA.¹⁰⁷ In filing its lawsuit against Kentucky, the EEOC noted

98. *Id.* The imputed years would be either the number of years necessary to bring the worker up to twenty years of service or to at least five years of service when the worker would turn fifty-five. *Id.* The plan will then use whichever number is lower as the imputed years. *Id.*

99. *Ky. Ret.*, 128 S. Ct. at 2365.

100. *Id.* For example, an employee who has worked only seven years cannot receive more than seven imputed years, but could receive seven or less imputed years. *See id.*

101. *Id.* The lawsuit was brought not only against Kentucky but also against Kentucky's plan administrator and various other state entities. *Id.*

102. *Id.*

103. *Ky. Ret.*, 128 S. Ct. at 2364-65

104. *Id.*

105. *Id.* Thus, Kentucky calculated Lickteig's pension based upon the normal mode of calculation for normal retirement. *See id.*

106. *Id.*

107. *Id.*

that if Lickteig had been disabled prior to turning fifty-five, the Plan would have imputed a number of additional years into his pension.¹⁰⁸ Thus, the EEOC argued that the Plan only failed to add those imputed years because Lickteig became disabled after reaching the age of fifty-five.¹⁰⁹

C.Procedural Posture

The United States District Court for the Western District of Kentucky found that the EEOC could not establish age discrimination and thus granted summary judgment to Kentucky.¹¹⁰ Initially the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the district court.¹¹¹ The Sixth Circuit, however, granted a rehearing en banc and found that the Kentucky Retirement Plan did violate the ADEA.¹¹² The Sixth Circuit then reversed and remanded the case for further proceedings.¹¹³ Kentucky sought certiorari and based on the potential impact of the Sixth Circuit's decision on retirement plans and pension benefits, the Supreme Court of the United States granted the writ.¹¹⁴

IV. ANALYSIS

A. Justice Breyer's Majority Opinion Joined by Chief Justice Roberts and Justice Stevens, Justice Souter, and Justice Thomas

Justice Breyer begins his opinion by citing *Hazen Paper* and utilizing that precedent to explain and examine the case at issue.¹¹⁵

108. *Id.*

109. *Id.*

110. *Id.* at 2366.

111. *Id.*

112. *Id.* "The ADEA forbids an employer to 'fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.'" *Id.* (citing 29 U.S.C. § 623(a)(1) (2006)).

113. *Ky. Ret.*, 128 S. Ct. at 2366.

114. *Id.*

115. *Id.* In *Hazen Paper* the Court held "that where, as here, a plaintiff claims age-related 'disparate treatment' (i.e., *intentional* discrimination 'because of

He notes the comparability between *Kentucky Retirement* and *Hazen Paper*, because he believes that both cases deal with disparate treatment issues and can be analyzed best under a disparate treatment theory of liability.¹¹⁶ He notes that while no ADEA violation was found to exist in *Hazen Paper* because the dismissal was based on pension status and not age, the case *did* indicate that discrimination based on pension status could, under the right circumstances, be unlawful under the ADEA.¹¹⁷ He notes, however, that while pension status and age go hand-in-hand, they are still analytically distinct.¹¹⁸ Thus, as was decided in *Hazen Paper*, dismissal based solely on pension status would not be grounds for the finding of an ADEA violation as analyzed under a disparate treatment theory.¹¹⁹ Through his reading of *Hazen Paper*, Justice Breyer pulls out several “special case[s]” where discrimination based on pension status may lead to a violation of the ADEA, since that discrimination is simultaneously based on age.¹²⁰ For example, Justice Breyer notes that where an employer targets employees with a particular pension status based on an assumption that the employees are older, an ADEA violation may be found.¹²¹ Similarly, he notes that *Hazen Paper* suggested that if an employee is vesting his pension status as a result of his age and not his years of service, any discrimination associated with that could potentially violate the ADEA.¹²² Justice Breyer then notes that the case at issue, *Kentucky Retirement*, represents one of the aforementioned “special case[s].”¹²³

Following his examination of *Hazen Paper* and its potential applicability to *Kentucky Retirement*, Justice Breyer enumerates six

age’) the plaintiff must prove that age ‘*actually motivated* the employer’s decision.’” *Id.* (citing *Hazen Paper*, 507 U.S. at 610).

116. See *Ky. Ret.*, 128 S. Ct. at 2366. He states that the disparate impact theory is “not here at issue” because it “focuses upon unjustified discriminatory results.” *Id.*

117. *Id.* at 2366-67.

118. *Ky. Ret.*, 128 S. Ct. at 2367.

119. *Id.* This is because ADEA violations will only be found if employment discrimination is based on age, not just pension status.

120. *See id.*

121. *Id.*

122. *Id.*

123. *See id.*

reasons he believes that, in this particular case, “differences in treatment were not ‘actually motivated’ by age.”¹²⁴

1. Distinctiveness of Age and Pension

Justice Breyer first notes that age and pension, as a matter of logic, are “analytically distinct.”¹²⁵ Thus, it is possible that decisions are made as a result of pension status and not age even if pension status is *based* on age.¹²⁶

2. Background Circumstances

Elaborating on his first point, Justice Breyer explains that in the Kentucky retirement system there exist numerous background circumstances that “eliminate the possibility that pension status, though analytically distinct from age, nonetheless serves as a ‘proxy for age’ in Kentucky’s Plan.”¹²⁷

124. *Id.* The word “treatment” refers to the treatment of hazardous workers under the Kentucky Retirement Plan. Justice Breyer, writing for the Court, believes that the Kentucky Retirement System does not violate the ADEA because its special treatment of disabled workers, who become disabled after they were eligible for retirement, is not motivated by age. *See id.*

125. *Id.* (citing *Hazen Paper*, 507 U.S. at 611). He believes that “one can easily conceive of decisions that are actually made ‘because of’ pension status and not age, even where pension status is itself based on age.” *Ky. Ret.*, 128 S. Ct. at 2367. To further demonstrate this point, he offers an example:

[A]n employer pays all retired workers a pension, retirement eligibility turns on age, say 65, and a 70-year-old worker retires. Nothing in the language or in logic prevents one from concluding that the employer has begun to pay the worker a pension, not because the worker is over 65, but simply because the worker has retired.

Id.

126. *Id.* (emphasis added). Justice Breyer notes that just because age is used to determine pension status, it does not mean that age motivated the decisions. *See id.* Because age is often a necessary tool in determining if an employee has reached pension status, it cannot be said that simply because age is a factor, the ADEA was violated. *See id.*

127. *Id.* Justice Breyer thus attests that, although age and pension status are distinct, even if they were not viewed as such, in the present case, pension status does *not* serve as a substitute for age in the Kentucky Retirement Plan. *See id.*

One such background circumstance that Justice Breyer articulates is that the ADEA treats pension benefits more flexibly and leniently with respect to age.¹²⁸ He then cites to the ADEA, offering an explanation of when and how the ADEA practices such leniency.¹²⁹ He further notes that the Kentucky Plan is non-discriminatory because it promises *all* hazardous position employees disability benefits, and additional disability retirement benefits should the worker become disabled prior to his eligibility for normal retirement benefits.¹³⁰

Justice Breyer further notes, as an additional background circumstance, that Congress has previously approved programs that calculate disability benefits using a formula that takes age into account.¹³¹ Furthermore, until 1984, all federal employees “received permanent disability benefits based on a formula that, in certain circumstances, did not just consider age, but effectively imputed years of service *only* to those disabled workers younger than 60.”¹³² Thus, because age has previously been used in the determination of benefits under numerous retirement plans, Justice Breyer believes that in *Kentucky Retirement*, pension status does not need to serve as a proxy for age because age *can* be used as a basis for determining pension status when coupled with other factors.

3. Non-Age-Related Rationale

Even though age is a consideration, Justice Breyer asserts that because Kentucky calculates normal retirement benefits in much the same way as it calculates disability retirement benefits, there is a

128. *Id.*

129. *Id.* Justice Breyer notes that the ADEA “explicitly allow[s] pension eligibility to turn on age” and that the ADEA allows an “employer to consider (age-related) pension benefits in determining level of severance pay.” *Ky. Ret.*, 128 S. Ct. at 2367 (citing 29 U.S.C. §§ 623(l)(1)(A)(i), 623(l)(2)(A) (2006)).

130. *Ky. Ret.*, 128 S. Ct. at 2367-68.

131. *Id.* “For example, the Social Security Administration now uses such a formula in calculating Social Security Disability Insurance benefits.” *Id.* at 2368 (citing 42 U.S.C. § 415(b)(2)(B)(iii) (2006) and 20 C.F.R. § 404.211(e) (2007)).

132. *Ky. Ret.*, 128 S. Ct. at 2368 (citing 5 U.S.C. § 8339(g) (2006)) (emphasis added).

clear *non-age-related* basis for the disparity at issue.¹³³ The only difference, he notes, between the two plans, normal retirement and disabled retirement, is that in order to calculate disabled retirement benefits, imputed years are added onto the worker's actual years of service.¹³⁴ The disability rules and the purpose of the "imputed years" simply treat the disabled worker as though he became disabled after becoming eligible for retirement.¹³⁵ Thus, age *only* factors into this calculation because the *normal retirement* rules, themselves,

133. *Ky. Ret.*, 128 S. Ct. at 2367-68. In order to illustrate this fact, Justice Breyer offers an example:

Suppose that Kentucky's Plan made eligible for a pension (a) day-shift workers who have 20 years of service, and (b) night-shift workers who have 15 years of service. Suppose further that the Plan calculates the amount of the pension the same way in either case, which method of calculation depends solely upon years of service If the Plan were then to provide workers who become disabled prior to pension eligibility the same pension the workers would have received had they worked until they became pension eligible, the plan would create a disparity between disabled day-shift and night-shift workers: A day-shift worker who becomes disabled *before* becoming pension eligible would, in many instances, end up receiving a bigger pension than a night-shift worker who becomes disabled *after* becoming pension eligible. For example, a day-shift worker who becomes disabled prior to becoming pension-eligible would receive an annual pension of \$20,000, while a night-shift worker who becomes disabled after becoming pension-eligible, say, after 16 years of service, would receive an annual pension of \$16,000.

Id. at 2368. Justice Breyer states that the only difference, in the area of imputed years, between this example and the situation in *Kentucky Retirement* "is simply an artifact of Plan rules that treat one set of workers more generously in respect to the *timing of their eligibility for normal retirement benefits* but which do not treat them more generously in respect to the *calculation of the amount* of their normal retirement benefits." *Id.* at 2369. Thus, the Plan simply treats disabled non-pension eligible employees as if they had worked until the time they would have been pension eligible. *Id.*

134. *Id.* Justice Breyer notes that there is one difference between the Plan's calculation of normal retirement benefits and its calculation of disability retirement benefits. *See id.* The Plan only imputes additional years when calculating disability retirement benefits and only does so to bring the individual worker's years of service to twenty *or* to the number of years it would take for the worker to reach the age of fifty-five. *Id.* at 2369.

135. *Id.*

include age as a consideration.¹³⁶ Because age is only used as a means of treating the disabled worker as though he had worked until the point at which he would have become eligible for normal retirement benefits, “[t]he disparity turns upon *pension eligibility* and nothing more.”¹³⁷

4. Advantage to Older Workers

Although Lickteig was disadvantaged by the Plan, Justice Breyer states that, in another situation, an older worker could actually benefit from the Plan.¹³⁸ He offers the following example:

Consider, for example, two disabled workers, one of whom is aged 45 with 10 years of service, one of whom is aged 40 with 15 years of service. Under Kentucky’s scheme, the older worker would actually get a bigger boost of imputed years than the younger worker (10 years would be imputed to the former, while only 5 years would be imputed to the latter).¹³⁹

Consequently, the proof that an older worker can actually benefit from the Plan confirms that an effort to discriminate based on age was not the underlying motive in the establishment of the Plan.¹⁴⁰

5. Lack of Stereotypical Assumptions

One primary reason Congress enacted the ADEA was to eradicate the discrimination of older employees in the workplace and the stereotypical assumptions about those older workers.¹⁴¹ Justice

136. *Id.*

137. *Id.* at 2369 (emphasis added).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* Justice Breyer finds that “Kentucky’s system does not rely on any of the sorts of stereotypical assumptions that the ADEA sought to eradicate.” *Id.* W. Willard Wirtz listed, as one of his findings, that “although age discrimination rarely is based on the sort of animus that motivates racial, national origin, or religious discrimination, it is based upon stereotypical assumptions of the abilities of the

Breyer asserts that Kentucky's Plan does not rely on those stereotypical assumptions and does not make any stereotypical distinctions about the "work capacity of 'older' workers *relative to* 'younger' workers."¹⁴² He explains that the Plan only makes two assumptions and neither is based on, or involves, age-related stereotypes.¹⁴³ The Plan first assumes that all disabled workers, had they not been disabled, would have worked until they reached the point of pension eligibility.¹⁴⁴ Second, the Plan assumes that no disabled worker would have continued working after becoming disabled and reaching pension eligibility.¹⁴⁵ These assumptions, Justice Breyer attests, apply to all workers regardless of age.¹⁴⁶

6. Burdensome Remedy

Justice Breyer believes that a remedy for the alleged unequal treatment of older, disabled workers under the Kentucky Plan would be difficult to discern and even more difficult to implement.¹⁴⁷ Kentucky would either have to drastically cut benefits given to disabled workers who are not pension-eligible at the time they become disabled, or Kentucky would have to increase the benefits given to employees who become disabled after reaching pension

aged, unsupported by objective facts." Cozza, *supra* note 1, at 774. Consequently, Congress enacted the ADEA to combat these stereotypical assumptions. *See id.* Justice Breyer, however, notes that the Kentucky Plan does not rely on stereotypes and thus the ADEA was not meant to apply to plans like that of Kentucky. *Ky. Ret.*, 128 S. Ct. at 2369.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* Justice Breyer believes:

The difficulty of finding a remedy that can both correct the disparity and achieve the Plan's legitimate objective—providing each disabled worker with a sufficient retirement benefit, namely, the normal retirement benefit that the worker would receive if he were pension eligible at the time of disability—further suggests that this objective and not age "actually motivated" the Plan.

Id.

eligibility.¹⁴⁸ Justice Breyer highlights, however, one major flaw in the latter remedy: Kentucky has no criteria for determining how many imputed years to add to the years of service totals of those employees who became disabled after reaching the age of pension eligibility.¹⁴⁹ Thus, Justice Breyer asserts that there is no remedy that would address the uneven treatment of disabled workers that would not also jeopardize the amount that non-pension eligible disabled workers received.¹⁵⁰ This, he believes further demonstrates that Kentucky's Plan is not motivated by age but rather by necessity.¹⁵¹

Following Justice Breyer's examination of the aforementioned factors, he explains that the majority opinion does not settle unclear precedent since the deferential treatment presented in this case was based upon pension status, not age.¹⁵² He goes on to assert the rule the Court derived from this case:

Further, the rule we adopt today for dealing with this sort of case is clear: Where an employer adopts a pension plan that includes age as a factor, and that employer then treats employees differently based on pension status, a plaintiff, to state a disparate treatment claim under the ADEA, must adduce sufficient evidence to show that the differential treatment was "actually motivated" by *age*, not pension status.¹⁵³

Justice Breyer explains that in applying this rule to future cases of this nature, the plaintiff will have the burden of proving that he received differential treatment based on age and to do this, he can use the six previously mentioned factors.¹⁵⁴

148. *Id.*

149. *Id.*

150. *See id.*

151. *Id.*

152. *Id.* This is because the case presented in *Kentucky Retirement* is a "quite special case of differential treatment based on pension status, where pension status-with the explicit blessing of the ADEA-itself turns, in part, on age." *Id.* at 2369-70.

153. *Id.* at 2370.

154. *Id.*

Finally, Justice Breyer rejects two additional arguments made by the EEOC.¹⁵⁵ First, he addresses an amendment that was added to the ADEA after a Supreme Court decision in 1989.¹⁵⁶ This exception states that “any bona fide employee benefit plan . . . which is not a subterfuge to evade the purposes of the Act” would be exempt from the ADEA prohibitions.¹⁵⁷ While Justice Breyer agrees that this amendment “narrowed the statutorily available justifications for age-related differences,” he also notes that the amendment does not apply in this case because the Kentucky Plan was not “actually motivated” by age.¹⁵⁸ Justice Breyer then goes on to disavow the EEOC’s next argument by noting that the regulation in the EEOC Regulation and Compliance Manual which states, “the same level of benefits to older workers as to younger workers’ does *not* violate the [ADEA],” does little more than restate the statute itself.¹⁵⁹ The Regulation and Compliance Manual further provides that determining disability retirement benefits based on the number of

155. *Id.* The first additional argument the EEOC makes is that “it looks for support to an amendment that Congress made to the ADEA after this Court’s decision in *Public Employee Retirement System of Ohio v. Betts*.” *Id.* Second, the EEOC “says that [the Court] must defer to contrary EEOC interpretation contained in an EEOC regulation and compliance manual.” *Id.*

156. *Id.* In *Public Employees Retirement System of Ohio v. Betts* an employer denied the employee disability benefits because under its program, only workers who became disabled before reaching the age of sixty could receive benefits and the employee in *Betts* was sixty-one. *Ky. Ret.*, 128 S. Ct. at 2370 (citing *Pub. Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158 (1989)). The Court in *Betts* found that the employer’s decision fell within the new ADEA exception. *Id.*

157. *Ky. Ret.*, 128 S. Ct. at 2370. Congress later amended the “not a subterfuge” language with a provision that stated that “age-based disparities in the provision of benefits are lawful only when they are justified in respect to cost savings.” *Id.* (citing 29 U.S.C. § 623(f)(2)(B)(i) (2006)).

158. *Ky. Ret.*, 128 S. Ct. at 2370.

159. *Id.* (citing 29 C.F.R. § 1625.10(a)(2) (2007)). The Compliance Manual further states: “[b]asing disability retirement benefits on the number of years a disabled employee *would have worked* until normal retirement age by definition gives more constructive years of service to younger than to older employees’ and thus violates the Act.” *Ky. Ret.*, 128 S. Ct. at 2371 (quoting 2 EEOC Compliance Manual § 3, p. 627:0010 (2001)). Justice Breyer believes that while such Compliance Manuals are entitled to respect, the Court is entitled to its interpretation of the ADEA. *Ky. Ret.*, 128 S. Ct. at 2371; *see also Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 111(2002) (finding that compliance manuals are entitled to the Court’s respect).

years an employee would have worked does violate the ADEA, because it gives more imputed years to the younger employees.¹⁶⁰ In contrast, Justice Breyer cites *Hazen Paper* and advocates for the disparate treatment theory, by noting that the Act requires a showing of discriminatory intent in order for a violation to be found.¹⁶¹

B. Justice Kennedy's Dissenting Opinion Joined by Justice Scalia, Justice Ginsburg, and Justice Alito

1. Majority Unsettles the Issue

Prior to explaining his contention with the majority, Justice Kennedy reprimands the majority for “ignor[ing] established rules for interpreting and enforcing one of the most important statutes Congress has enacted to protect the Nation’s work force from age discrimination, the [ADEA].”¹⁶² He scolds the majority for not correctly reading the statute and notes that the most straightforward reading of the statute is the correct one.¹⁶³ Stemming from the majority’s alleged misreading of the statute, Justice Kennedy notes that the majority’s decision undercuts not only the true meaning of the statute, but also “creates unevenness in administration, unpredictability in litigation, and uncertainty as to employee rights once thought well settled.”¹⁶⁴ Justice Kennedy lists a number of cases decided in a number of different circuit courts, which boast

160. *Ky. Ret.*, 128 S. Ct. at 2371 (citing 29 C.F.R. § 1625.10(a)(2) (2007)).

161. *Ky. Ret.*, 128 S. Ct. at 2371. Justice Breyer believes the Compliance Manual is contrary to the Court’s interpretation of the ADEA. *Id.* Furthermore, he states that the Manual makes little effort to justify its ADEA interpretation and thus lacks “the necessary ‘power to persuade’ us.” *Id.* (citing *Skidmore v. Swift Co.*, 323 U.S. 134, 140 (1944)).

162. *Ky. Ret.*, 128 S. Ct. at 2371 (Kennedy, J., dissenting) (“The Court today ignores established rules for interpreting and enforcing one of the most important statutes Congress has enacted to protect the Nation’s work force from age discrimination, the Age Discrimination in Employment Act of 1967 . . .”).

163. *Id.* (Kennedy, J., dissenting). Justice Kennedy states that had the majority correctly read the statute, they would have reached the following conclusion: “When an employer makes age a factor in an employee benefit plan in a formal, facial, deliberate, and explicit manner, to the detriment of older employees, this is a violation of the Act.” *Id.* (Kennedy, J., dissenting).

164. *Id.* at 2372 (Kennedy, J., dissenting).

holdings different from the one decided by the majority.¹⁶⁵ This clash among the circuits and the Supreme Court, Justice Kennedy believes, is unacceptable.

2. Majority Misinterprets Precedent to Reach Wrong Conclusion

Justice Kennedy condemns the majority for failing to recognize and address the discriminatory nature of Kentucky's Plan.¹⁶⁶ He points out that those employees who become disabled prior to reaching the *age* of retirement eligibility are treated in a vastly different manner than those employees who become disabled after reaching the *age* of retirement.¹⁶⁷ Whether Kentucky intended to discriminate or not, the result of the Plan is a system that "compensates otherwise similarly situated individuals differently based on age."¹⁶⁸

Justice Kennedy then looks to the holding in *Hazen Paper*, and asserts that the Court in *Hazen Paper* made it clear that "no additional proof of motive is required in an ADEA case once the employment policy at issue is deemed discriminatory on its face."¹⁶⁹ Justice Kennedy interprets *Hazen Paper* to mean that any facially discriminatory policy requiring adverse treatment of older employees (or any employees with the protected trait) is "actually motivated" by

165. *Id.* (Kennedy, J., dissenting); see *EEOC v. Jefferson Cty. Sheriff's Dept.*, 467 F.3d 571, 573 (6th Cir. 2006) (overturning *Lyon v. Ohio Ed. Ass'n & Prof. Staff Union*, 53 F.3d 135 (6th Cir. 1995)); see also, e.g. *Jankovitz v. Des Moines Indep. Cmty. Sch. Dist.*, 421 F.3d 649, 653-55 (8th Cir. 2005); *Abrahamson v. Bd. of Ed. of Wappingers Falls Cent. Sch. Dist.*, 374 F.3d 66, 72-73 (2d Cir. 2004); *Arnett v. Cal. Pub. Employees Ret. Sys.*, 179 F.3d 690, 695-97 (9th Cir. 1999); *Auerbach v. Bd. of Ed. of Harborfields Cent. Sch. Dist.*, 136 F.3d 104, 109-14 (2d Cir. 1998); *Huff v. UARCO, Inc.*, 122 F.3d 374, 387-88 (7th Cir. 1997).

166 *Ky. Ret.*, 128 S. Ct. at 2371 (Kennedy, J., dissenting).

167. *Id.* at 2372-73 (Kennedy, J., dissenting). Justice Kennedy illustrates that "[i]f the employee can no longer work as a result of a disability . . . he or she is entitled to receive disability retirement. Employees who are eligible for normal retirement benefits are ineligible for disability retirement." *Id.* at 2372 (Kennedy, J., dissenting). This means that employees that are in the "normal retirement system" are only compensated based on their actual years of service. *Id.* (Kennedy, J., dissenting). However, employees in the "disability retirement system" get a bonus of imputed years. *Id.* at 2372-73 (Kennedy, J., dissenting).

168. *Id.* at 2373 (Kennedy, J., dissenting).

169. *Ky. Ret.*, 128 S. Ct. at 2374 (Kennedy, J., dissenting).

age.¹⁷⁰ He reiterates that the rule the Court should adhere to, as stated in *Hazen Paper*, “is that once the plaintiff establishes that a policy discriminates on its face, no additional proof of a less-than-benign motive for the challenged employment action is required.”¹⁷¹ Justice Kennedy cites two additional Supreme Court cases in support of the aforementioned *Hazen Paper* rule, *Trans World Airlines, Inc. v. Thurston* and *Los Angeles Department of Water & Power v. Manhart*.¹⁷² In both cases, the Court held that proof of a discriminatory motive or “effect” is not necessary so long as the policy or practice is “discriminatory on its face.”¹⁷³ By failing to recognize the rule established in *Hazen Paper*, *Thurston*, and *Manhart*, the Court in *Kentucky Retirement* reaches a conclusion that violates the ADEA.

In addition to Justice Kennedy’s belief that the majority misinterprets the rule of *Hazen Paper*, he also believes the majority has overstated what *Hazen Paper* meant when it noted that “pension status and age are ‘analytically distinct.’”¹⁷⁴ He states that the majority’s interpretation of this language from *Hazen Paper* creates

170. *Id.* (Kennedy, J., dissenting). Justice Kennedy notes if the holding in *Hazen Paper* is read without qualification, the majority’s interpretation might have been correct (that is, “that an employment practice discriminated only if it is ‘actually motivated’ by the protected trait.”). *Id.* (Kennedy, J., dissenting) (quoting *Hazen Paper*, 507 U.S. at 610). However, if the relevant passage is read in full, “*Hazen Paper* makes quite clear that no additional proof of motive is required in an ADEA case once the employment policy at issue is deemed discriminatory on its face.” *Id.* (Kennedy, J., dissenting).

171. *Id.* at 2374-75 (Kennedy, J., dissenting).

172. *Id.* at 2375 (Kennedy, J., dissenting).

173. *Ky. Ret.*, 128 S. Ct. at 2375 (Kennedy, J., dissenting). In *Thurston*, the Court found that the policy discriminated against older workers because while the policy did allow pilots over the age of sixty to continue working, it required that they be transferred to the position of flight engineer and they would have to bid for that position. *Id.* at 2375 (Kennedy, J., dissenting) (citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985)). Under the bid procedure, a pilot who had to switch positions because of a disability had priority over one that had to switch based on age. *Ky. Ret.*, 128 S. Ct. at 2375 (Kennedy, J., dissenting) (citing *Thurston*, 469 U.S. at 111). In *Manhart*, the retirement plan forced female employees to make larger contributions to their retirement than male employees. *Ky. Ret.*, 128 S. Ct. at 2375 (Kennedy, J., dissenting) (citing *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702 (1978)).

174. *Ky. Ret.*, 128 S. Ct. at 2375 (Kennedy, J., dissenting) (citing *Hazen Paper*, 507 U.S. at 611).

“a virtual safe harbor for policies that discriminate on the basis of pension status, even when pension status is tied directly to age”¹⁷⁵ Justice Kennedy, however, emphasizes that the facts of *Hazen Paper* are distinct from those present in *Kentucky Retirement*.¹⁷⁶ In *Hazen Paper*, pension status and age were “analytically distinct” because the employee’s pension eligibility had nothing to do with age—it was tied solely to years of service.¹⁷⁷ In *Kentucky Retirement*, however, an employee’s pension eligibility is not only tied with years of service but with age as well. Based on these differences, Justice Kennedy notes that “[*Kentucky Retirement*] is the opposite of *Hazen Paper*.”¹⁷⁸

3. Flawed Reasoning of the Majority

Justice Kennedy believes that the majority’s holding in *Kentucky Retirement* will open the door for companies to enact policies using pension eligibility as a factor in determining other benefits (e.g.

175. *Ky. Ret.*, 128 S. Ct. at 2375 (Kennedy, J., dissenting). He believes that the Court in *Hazen Paper* did not support or allow this creation of a safe harbor when pensions status and age are tied together. *Id.* (Kennedy, J., dissenting).

176. *Id.* (Kennedy, J., dissenting).

177. *Id.* (Kennedy, J., dissenting).

178. *Id.* (Kennedy, J., dissenting). He notes that in *Kentucky Retirement* the age discrimination is active and age is actively used as a factor in Kentucky’s Plan. *Id.* at 2376 (Kennedy, J., dissenting). He believes that because the discrimination is active in the Plan, *Kentucky Retirement* is distinguishable from *Hazen Paper*. *Ky. Ret.*, 128 S. Ct. at 2375 (Kennedy, J., dissenting). He further explains that because age is used as a determining factor of pension eligibility and pension status is used to determine eligibility for disability benefits, pension status and age merge into one category. *Id.* (Kennedy, J., dissenting). Based on this merger, Justice Kennedy concludes that Kentucky facially discriminates on the basis of age. *Id.* at 2376 (Kennedy, J., dissenting). Similarly, Justice Kennedy disagrees with the majority’s attempt to reconcile its holding under the ADEA’s exemption allowing employers to condition pension eligibility on age. *Id.* (Kennedy, J., dissenting). He believes that the exemption provides the majority no support because its coverage is limited to: “[E]mployee pension benefit plan[s] [that] provid[e] for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits.” *Id.* (Kennedy, J., dissenting) (citing 29 U.S.C. § 623(l)(1)(A)(i) (Supp. 2007)). Justice Kennedy believes that if Kentucky’s Plan is allowed to “fit through” this exemption, any number of benefits will be allowed under the ADEA so long as they are tied to an “age-based pension status designation.” *Id.* (Kennedy, J., dissenting).

health care benefits, job assignments, reimbursements, promotions, parking privileges).¹⁷⁹ He believes in this possibility based upon the reasoning the majority uses to explain and “limit” its holding.¹⁸⁰ Justice Kennedy refers to the majority’s reasoning that, in *Kentucky Retirement*, age is not the sole determining factor of pension eligibility but is one factor “embedded in a set of ‘complex system-wide rules.’”¹⁸¹ Thus, the majority held that “there is no discrimination on the basis of a protected trait if the trait is one among several factors that bear upon how an employee is treated.”¹⁸² Justice Kennedy strongly opposes this reasoning noting that there are no cases or statutes indicating that discrimination based on age, or any other protected trait, is allowed so long as the protected trait “is one among many variables.”¹⁸³

179. *Ky. Ret.*, 128 S. Ct. at 2376 (Kennedy, J., dissenting). Justice Kennedy writes: “If the ADEA allows an employer to tie disability benefits to an age-based pension status designation, that same designation can be used to determine wages, hours, health care benefits, reimbursements, job assignments, promotions, office space, transportation vouchers, parking privileges, and any other conceivable benefit or condition of employment.” *Id.* (Kennedy, J., dissenting).

180. *See id.* (Kennedy, J., dissenting).

181. *Id.* (Kennedy, J., dissenting).

182. *Id.* at 2377 (Kennedy, J., dissenting).

183. *See Ky. Ret.*, 128 S. Ct. at 2376 (Kennedy, J., dissenting). Justice Kennedy argues that “[a]ge is a determining factor of pension eligibility for all workers over the age of 55 who have over 5 (but less than 20) years of service; and pension status, in turn, is used to determine eligibility for disability benefits.” *Id.* at 2375-76 (Kennedy, J., dissenting). Thus, pension eligibility or status and age “merge into one category.” *Id.* at 2376 (Kennedy, J., dissenting). Justice Kennedy believes the Court recognizes this problem and based on that recognition, attempts to limit its holding. *Id.* (Kennedy, J., dissenting). Justice Kennedy, however, believes the Court limits its holding “in ways not permitted by statute or our previous employment discrimination cases.” *Id.* (Kennedy, J., dissenting). The Court limits its holding by noting that age is not the *only* determining factor of pension eligibility and since there are other factors, pension status and age are not merged but are analytically distinct. *See id.* at 2376 (Kennedy, J., dissenting). Justice Kennedy strongly disagrees with this reasoning, asserting that there is nothing “in our prior ADEA cases . . . and certainly [nothing] in our related Title VII jurisprudence, that discrimination based on a protected trait is permissible if the protected trait is one among many variables.” *Id.* (Kennedy, J., dissenting). For example, in *Los Angeles Department of Water & Power v. Manhart*, “sex was not the only factor determining how much an employee was required to contribute to the pension plan on a monthly basis; the employee’s salary, age, and length of service were also variables in the equation.” *Id.* (Kennedy, J., dissenting) (citing

Justice Kennedy similarly dissents with several of the factors established by the majority opinion.¹⁸⁴ The factors he most vehemently disagrees with are those pertaining to “background circumstances.”¹⁸⁵ He asserts that “[t]here is a difference . . . between a laudable purpose and a rule of law,” a difference that renders the consideration of background circumstances nearly useless.¹⁸⁶ For example, a discriminatory employment policy cannot be deemed lawful just because the employer’s motives were benign.¹⁸⁷ Knowledge of why an employer enacted a certain policy is impertinent since all that matters is the rule of law and how that rule applies to the policy at hand.

In expressing his understanding of the reason behind the majority’s ruling, Justice Kennedy states: “The Court’s desire to avoid construing the ADEA in a way that encourages the Commonwealth to eliminate its early retirement program or to reduce benefits to the policemen and firefighters who are covered under the disability plan is understandable.”¹⁸⁸ The fact that Kentucky’s Plan might be good public policy, however, does not justify the majority’s

L.A. Dep’t of Water & Power v. Manhart, 435 U.S. 702, 705). However, despite the fact that other factors went into determining whether an employee had to contribute to the pension plan, the Court still found that the plan was facially discriminatory. *Ky. Ret.*, 128 S. Ct. at 2376-77 (Kennedy, J., dissenting) (citing *Manhart*, 435 U.S. at 711).

184. *See Ky. Ret.*, 128 S. Ct. at 2377 (Kennedy, J., dissenting).

185. *See id.* (Kennedy, J., dissenting).

186. *Id.* (Kennedy, J., dissenting).

187. *Id.* (Kennedy, J., dissenting).

188. *Id.* at 2378 (Kennedy, J., dissenting). While Justice Kennedy understands the majority’s reluctance to force Kentucky to alter its retirement policies, he offers examples of just how easy it would be for Kentucky to change their policies in order to eliminate the discrimination of older workers. *See id.* (Kennedy, J., dissenting). Justice Kennedy believes that “Kentucky could avoid any problems by not imputing un-worked years of service to any disabled workers, old and young alike.” *Ky. Ret.*, 128 S. Ct. at 2378 (Kennedy, J., dissenting). Under this scenario, younger workers would still receive disability benefits; they would just not reap the benefits of imputed years. Similarly, this change would place older workers that worked past the age of pension eligibility on equal footing with younger workers. Another option would be to force older workers to retire immediately upon reaching the age of pension eligibility. *See id.* (Kennedy, J., dissenting). With the absence of employees that have worked past the age of pension eligibility, Kentucky could continue to impute years of service to its disabled workers without violating the ADEA.

decision to ignore precedent, ignore the plain text of the Act, and misconstrue the meaning of the ADEA.¹⁸⁹

V. IMPACT

A. Impact on Employees

The Court's decision in *Kentucky Retirement* to uphold Kentucky's Retirement Plan and consequently validate the use of the disparate treatment theory of liability even when an employment policy is facially discriminatory, impacts both employers and employees in distinct ways. The holding places an immensely heavy burden on employees trying to allege discrimination for they are now the ones who must prove that the employer's decision to enact the policy was "actually motivated" by age.¹⁹⁰ Aside from this extensive burden, the holding in *Kentucky Retirement* has the effect of stripping employees of several other employment privileges and rights. Under Kentucky's Plan, two employees who have served a given employer for the same amount of time but are different ages may receive vastly different benefits.¹⁹¹

1. Affected Employees

As demonstrated by Justice Kennedy, in his dissenting opinion, the holding in *Kentucky Retirement* is not limited to disability benefits, hazardous workers, or any of the other specific characteristics of the case.¹⁹² Justice Kennedy notes that according to the decision of the Court, "[i]f the ADEA allows an employer to tie disability benefits to an age-based pension status designation, that same designation can be used to determine wages, hours, health care

189. See *id.* at 2379 (Kennedy, J., dissenting).

190. See *id.* (Kennedy, J., dissenting).

191. Mark Walsh, *Justices Examine Age Disparity in Retirement Systems*, EDUCATION WEEK 16, 16 (2008). As noted by Justice Breyer in the majority opinion, there are some instances in which an older employee will actually benefit *more* from the current Plan than a younger employee. See *supra* note 139. However, while some older employees will and currently do benefit from the Plan, many other employees are severely disadvantaged by it.

192. *Ky. Ret.*, 128 S. Ct. at 2376 (Kennedy, J., dissenting).

benefits, reimbursements, job assignments, promotions, office space, transportation vouchers, parking privileges, and any other conceivable benefit or condition of employment.”¹⁹³ While the Court’s ruling was issued in the context of pension eligibility being used as a factor for the determination of disability benefits for hazardous workers, the holding really gives employers, in any profession, the freedom to use pension eligibility as a factor to determine any number of benefits. Since most working Americans will eventually reach an age at which they are eligible to collect retirement benefits, the ruling in *Kentucky Retirement* could potentially adversely impact the entire American workforce. Thus, upon reaching the *age* of pension eligibility, many employees will face the possibility of that eligibility being used against them as a factor in determining their benefits.

2. Early Retirement Incentive

The inducement of early retirement, at first glance, doesn’t seem the least bit harmful to the United States workforce. However, when that incentive involves the threat of fewer potential benefits, should the employee choose to work past the age of retirement eligibility, the incentive not only violates the ADEA, but also proves to be extremely detrimental to employees nationwide. Furthermore, because of the current economic state of our nation as well as the multitudes of workers soon to be reaching “the age of retirement,”¹⁹⁴

193. *Id.* (Kennedy, J., dissenting).

194. See generally Darrell R. VanDeusen & Meg Gallucci, *Baby Boomers Retire—Impact on the Law*, MD. B.J. 18, 18-20 (2009). In December 2008, the National Bureau of Economic Research (NBER) announced that the United States was in the midst of a recession. Tom Abate, *It’s Official: U.S. in Recession All of 2008*, S.F. CHRONICLE, Dec. 02, 2008, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/12/02/MNTL14FCBU.DTL>. The NBER further declared that the “economy has been in retreat since last December sent Wall Street into a bearish fit that knocked nearly 9 percent off the S&P 500 index.” *Id.* Additionally, “[m]any economists believe that current downturn could be the worst since the recession of 1980-1982, when the U.S. unemployment rate soared above 10 percent.” *Id.* The current economic state of the nation has caused countless companies to scale back. See *id.* Currently, the jobless rate for the nation is 6.5 percent. *Id.*; see also CNN Money, *Mounting Job Losses*, http://money.cnn.com/news/specials/job_cuts/2009/ (last visited April 6, 2009); see also Reuters, *Calif. Jobless Hits Double Digits*, CNN MONEY, Feb. 27, 2009,

it is increasingly important for the Court to mandate that employers protect their older employees and prevent them from creating facially discriminatory policies that deprive workers of their rights and earned privileges.

In our current economic climate when faced with huge losses in assets and investments, more and more Americans are opting to defer retirement.¹⁹⁵ A recently conducted survey shows that fifty-seven percent of Americans over the age of forty-five who lost money in investments over the past year are expected to delay retirement.¹⁹⁶ In addition, one in four of those Americans have already postponed plans to retire.¹⁹⁷ With this modern increase in delayed retirement, the holding in *Kentucky Retirement* becomes vitally important as it has the potential to allow employers to discriminate on the basis on “pension eligibility” when determining what benefits those older working Americans will receive. Thus, if workers should choose to postpone retirement until their assets or investments once again increase in value, they will run the risk of receiving decreased benefits from employers. This potential decrease in benefits severely disadvantages older workers who, because of economic conditions out of their control, have to remain in the workforce past the point at

http://money.cnn.com/2009/02/27/news/economy/california_econ.reut/index.htm?postversion=2009022716.

195. Andrea Hopkins, *Older Americans Postpone Retirement as Economy Sags*, REUTERS, Jan. 17, 2009, <http://www.reuters.com/article/topNews/idUSTRE50G1PD20090117>. Many older American depended on their investments to fund their retirement. *Id.* However, “[t]he U.S. recession has compounded the problem, with home values too low to provide the nest egg many seniors need and interest rates on safer assets close to zero.” *Id.* For example, as of December 2, 2008, assets in retirement accounts have lost 32 percent of their value as compared with their value in September 2007. *Id.* Thus, a large population of older working Americans have chosen to work longer in order to replenish their retirement funds. *Id.*

196. *Id.*

197. *Id.* “Richard Johnson, an expert in seniors and retirement at the Urban Institute” notes, “[t]he average age people leave the workforce is still about 64 . . . [b]ut the share of older people in the workforce has been going up since 1998.” *Id.* Thus, as more and more older working Americans delay retirement, the “share of older people in the workforce” increases. *See id.* Additionally, as of August 2008, “36 percent of men and 26 percent of women aged 65 to 69 were still working, compared with just 26 percent of men and 17 percent of women 10 years earlier.” *Id.*

which they are eligible to collect their pensions. Similarly, based upon the sheer amount of older employees delaying retirement, the Court's decision in *Kentucky Retirement* will affect an extremely large population.¹⁹⁸

In addition to the need to postpone retirement because of America's weakened economy, other pension eligible workers simply want to keep working to remain connected to the "world of work."¹⁹⁹ The reasons for employees' continued desire to remain a part of the workforce vary: "To build and maintain financial security; to stay productive; or to remain socially engaged."²⁰⁰ Regardless of the reason, older workers should be entitled to work to whatever age they please without fear of losing benefits or facing discrimination. The ADEA was enacted to protect older employees and their right to work to an age of their choosing.²⁰¹ Thus, based upon the guarantees present in the ADEA, employers need to ensure that they provide for older workers in the same way they provide for younger workers. The holding in *Kentucky Retirement*, however, threatens the guarantees of the ADEA. According to *Kentucky Retirement*, employers are allowed to treat older and younger employees differently on the basis of pension status.²⁰² The Court's ruling not only makes the text of the ADEA moot, but also disadvantages all those employees wishing—for whatever reason—to remain a part of the workforce after becoming eligible for retirement.

While many older employees are delaying retirement, there are also many who, regardless of the current economic climate, still wish to retire upon reaching the age of retirement eligibility. Currently, "America is about to confront the largest shift in the overall age of its

198. *See id.*

199. VanDeusen & Gallucci, *supra* note 194, at 19.

200. *Id.*

201. Congress intended for the ADEA "to promote employment opportunities for older workers" by requiring employers to make decisions based not upon the age of workers, but upon their capabilities and job performance. Gregory, *supra* note 19, at 19. Thus, by requiring employers to make decisions based upon factors other than age, the ADEA essentially gives older workers the freedom to continue working until retirement or until they no longer have the ability to perform their duties to the standard required by their employer.

202. *See Ky. Ret.*, 128 S. Ct at 2366-67. This is conditioned on the fact that pension status and age are "analytically distinct" and that factors other than age go into determining pension status. *Id.*

workplace that our country has ever seen. Seventy-six million American children were born between 1946 and 1964.”²⁰³ With so many individuals born during that nearly twenty year period, and as members of that “boomer generation” near retirement eligibility, many analysts predict intense labor shortages.²⁰⁴ “While an estimated 19 million jobs will be created over the next six years, about 36 million boomers will leave the workforce at the same time.”²⁰⁵ With American companies facing such an immense employee shortage, it is vitally important to keep these “boomers” interested in working long enough so that when they do retire, others will be ready and able to replace them. The Court’s holding in *Kentucky Retirement*, however, threatens this situation. *Kentucky Retirement* made it possible for employers to use pension status as a factor in determining benefits and policies.²⁰⁶ As such, why would members of this boomer generation even consider working past the age at which they are pension eligible when doing so would put them at risk for discriminatory treatment? Thus, the Court’s ruling in *Kentucky Retirement* not only guides the decisions of older workers considering postponing retirement, but additionally threatens the workplace by encouraging the generation that is currently the most dominant in the workplace to retire immediately upon reaching the age of retirement eligibility.

203. VanDeusen & Gallucci, *supra* note 194, at 19.

204. *Id.*

205. *Id.*

206. *See Ky. Ret.*, 128 S. Ct at 2372-73 (Kennedy, J., dissenting). The majority makes it possible for employers to use pension eligibility as a factor for determining benefits by undercutting the basic framework of the ADEA and precedent. *Id.* at 2371 (Kennedy, J., dissenting). Justice Kennedy believes that “the Court today ignores established rules for interpreting and enforcing one of the most important statutes Congress has enacted to protect the Nation’s work force from age discrimination, the Age Discrimination in Employment Act.” *Id.* (Kennedy, J., dissenting). Previously, the ADEA was interpreted very literally and “the most straightforward reading of the statute [was] the correct one: When an employer makes age a factor in an employee benefit plan in a formal, facial, deliberate, and explicit manner, to the detriment of older employees, this is a violation of the Act.” *Id.* (Kennedy, J., dissenting). However, in interpreting the Act “as requiring a showing that the discrimination at issue ‘actually motivated’ the employer’s decision,” the majority allows pension eligibility to be used as a factor so long as age discrimination didn’t actually motivate the employers decision. *See id.* (Kennedy, J., dissenting).

3. Violation of ADEA Guaranteed Rights

The majority's ruling in *Kentucky Retirement* not only adversely affects the benefits of pension eligible employees, but also severely contravenes with the true meaning of the ADEA. In support of his opinion, Justice Breyer comments: "What you are looking at is to see whether the purpose of Congress is somehow implicated, a purpose designed to prevent stereotypical thinking from being used to put older people at a disadvantage . . . [a]nd there is no indication that this is so in this case."²⁰⁷ While Congress did enact section 623 of the ADEA to eradicate stereotypical assumption of older employees in the workplace, is this what the text of the ADEA says?²⁰⁸ The actual text of the ADEA states that it is unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."²⁰⁹ Nowhere in the text of the ADEA, however, does it state that the discrimination *must* be based on "stereotypical thinking."²¹⁰ In his dissent, Justice Kennedy advocates for a straightforward reading of the statute, noting that such a reading is the correct one.²¹¹ The text of the ADEA explicitly guarantees that older employees will be free from discrimination based on age in the workplace and a straightforward reading of this text would indicate that any discrimination, whether or not actually motivate by age, would violate the ADEA and employee rights under

207. Walsh, *supra* note 191, at 16.

208. While Congress's intent in enacting section 623 of the ADEA was to eradicate stereotypical thinking in the workplace, the text of the ADEA mentions nothing about worker stereotypes or the need for their eradication. See 29 U.S.C. § 623(a)(1) (2006). Rather, the text states: "It shall be unlawful for an employer to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . " *Id.*

209. *Id.*

210. *See id.*

211. *Ky. Ret.*, 128 S. Ct. at 2371 (Kennedy, J., dissenting) ("[T]he most straightforward reading of the statute is the correct one: When an employer makes age a factor in an employee benefit plan in a formal, facial, deliberate, and explicit manner, to the detriment of older employees, this is a violation of the [ADEA].").

the ADEA.²¹² Based upon this forthright reading of the text of the ADEA, it is obvious that the Kentucky's Plan violates the ADEA because, regardless of the motives or intentions behind the Plan, it does discriminate based on age. As Justice Kennedy affirms, "Kentucky's disability retirement plan violates the ADEA, an Act intended to promote the interests of older Americans."²¹³ In violating the ADEA, the Plan trounces on the rights guaranteed to employees by the ADEA.

B. Impact on Employers

While the Court's decision in *Kentucky Retirement* negatively impacts employees—depriving them of their ADEA guaranteed rights as well as limiting potential benefits they may receive after becoming eligible for retirement—the Court's ruling represents a victory for employers. As Justice Kennedy notes, the Court's ruling appears to suggest that age *can* be used as a factor so long as it "is not the sole determining factor of pension eligibility but is instead just one factor embedded in a set of 'complex system-wide rules.'"²¹⁴ Under the Plan, an employee's age and years of service are utilized to determine pension eligibility.²¹⁵ Thus, following the Court's holding, employers can theoretically use age as a factor to determine benefits, so long as it isn't the *only* factor.²¹⁶

212. See 29 U.S.C. § 623(a)(1) (2006).

213. *Ky. Ret.*, 128 S. Ct at 2378 (Kennedy, J., dissenting). Justice Kennedy believes the Court's ruling violates the ADEA because it *does* make age a factor, despite it being disguised as pension eligibility or status, which is to the detriment of older workers. See *id.* at 2371 (Kennedy, J., dissenting). By using pension eligibility, which is based upon the employees age, as a factor in determining retirement disability benefits, Kentucky discriminates on the basis of age thus, older workers are negatively affected. See *id.* (Kennedy, J., dissenting). Justice Kennedy further notes: "Kentucky could avoid any problems by not imputing unworked years of service to any disabled workers, old and young alike." *Id.* at 2378 (Kennedy, J., dissenting). This change would cause employers to treat older and younger workers the same. Justice Kennedy does note that this would result in the benefits of younger workers being cut, however, this would clearly be outweighed by the benefit of adhering to the ADEA. See *id.* (Kennedy, J., dissenting).

214. *Id.* at 2376 (Kennedy, J., dissenting).

215. *Id.* at 2365.

216. See *id.* at 2376.

1. Overwhelming Support

In support of the Plan, four amicus curiae briefs were filed. Those amici include thirteen states and several government associations (e.g. the National League of Cities and the National School Boards Association).²¹⁷ Conversely, only one amicus brief was filed in support of the EEOC, and the brief was filed by the American Association of Retired Persons and the National Employment Lawyers Association.²¹⁸ Aside from rearguing the case on its merits, those amici curiae in support of the petitioner, Kentucky Retirement Systems, urged the Court to uphold the Plan based on the financial burden and expense that ruling against it would have on companies and businesses.²¹⁹ The amici curiae contended that if the Plan were not to be upheld, many other states or companies with similar plans would have to expend great amounts of money and time to change their plans in accordance with the Court's ruling.²²⁰ The sheer number of states and organizations in support of Kentucky Retirement Systems and the Plan demonstrates the significant beneficial impact the Court's hold will have on employers.

2. Fiscal Responsibilities and Benefits

Pension plans distribute more than 140 billion dollars annually in benefits and "these payments . . . provide a robust economic stimulus to local economies throughout the nation."²²¹ Similarly, "studies

217. Law Memo: First in Employment Law, *Kentucky Retirement Systems v. EEOC*, <http://www.lawmemo.com/supreme/case/Kentucky/> (last visited Feb. 8, 2009).

218. *Id.*

219. Brief for the National Ass'n of State Retirement Administrators, et al. as Amici Curiae Supporting Petitioners at 8-9, *Kentucky Ret. Sys. v. EEOC*, 128 S. Ct. 2361 (2008) (No. 06-1037).

220. Brief for the States of Michigan et al. as Amici Curiae Supporting Petitioners at 10, *Kentucky Ret. Sys. v. EEOC*, 128 S. Ct. 2361 (2008) (No. 06-1037).

221. Brief for the National Ass'n of State Retirement Administrators, et al. as Amici Curiae Supporting Petitioners at 7, *Kentucky Ret. Sys. v. EEOC*, 128 S. Ct. 2361 (2008) (No. 06-1037).

indicate that public pension funds and the benefits they distribute make important contributions to the local, state, and national economies.”²²² In support of the Kentucky Retirement Plan, the amici curiae argued that invalidating the Plan would:

(1) upset the actuarial assumptions on which the states make funding decisions; (2) lead to huge expenses in designing, managing, and protecting these plans; (3) require fundamental constitutional and statutory changes in virtually every state in the U.S.; and (4) foster uncertainty in the national financial markets as the plans attempt to discern the status of the law and come into compliance with it.²²³

Thus, the main reason the Plan drew so much amici curiae support is simply fiscal. Consequently, the holding in *Kentucky Retirement* allows companies and businesses to leave intact their retirement plans, even if age is used as a factor, as long as there are other factors taken into consideration as well, in determining benefits (e.g. disability benefits) and pension status. The amici curiae further noted that had the Court’s holding in *Kentucky Retirement* not upheld the Plan, retirement plans across the nation would have been forced “to review and re-design their retirement plans.”²²⁴ The holding in *Kentucky Retirement* saves employers from having to undergo this strain. Rather than spend the time or money re-devising their retirement plans, employers are free to leave them as is—with age as a determining factor in pension benefits.

In addition to saving employers time and money, the holding in *Kentucky Retirement* offers them relief during this current time of economic strain and crisis.²²⁵ In December 2007, the United States

222. *Id.*

223. *Id.* at 8-9.

224. *Id.* at 11.

225. See Lucia Mutikani, *U.S. Business Climate Worst in 27 Years*, S.F. SENTINEL, Jan. 26, 2009, <http://www.sanfranciscosentinel.com/?p=19054> /. Currently, U.S. businesses “are experiencing the worst business conditions in 27 years.” *Id.* Similarly, a recent poll found that the economic slump worsened in the fourth quarter. *Id.* Because businesses are now seeing declines in profits, it will undoubtedly be a relief to such businesses that they are free to use pension

economy tipped into recession.²²⁶ The National Association of Business Economics (NABE) conducted a survey, which revealed that that United States is facing its worst economic conditions since 1982.²²⁷ For example, “[a]bout 47 percent of respondents in the NABE survey reported a fall in demand for services and goods, which was an all-time high, while only 20 percent saw an increase. This was the lowest percentage since the survey started in 1982.”²²⁸ In these times of economic turmoil when businesses are struggling to stay afloat, the holding in *Kentucky Retirement* relieves employers of the responsibility of having to revamp their retirement policies—an act that would undoubtedly cost employers and businesses thousands of very scarce and valuable dollars. The amici curiae in support of Kentucky Retirement Systems pointed out that had the Court in *Kentucky Retirement* invalidated the Plan, such a decision “could cost millions of dollars nationwide and could further weaken the economic viability of retirement funds that may already be underfunded.”²²⁹ Thus, in ruling in favor of the Plan, the Court in *Kentucky Retirement* saved employers countless capital, capital they likely depend on to fund and support other areas of their businesses.

eligibility as a factor in determining employee benefits. This newly Court-validated ability will enable employers to give pension eligible employees fewer benefits based on the fact that they worked past the time at which they were eligible to retire. Because employers would be able to give pension eligible employees fewer monetary (and non-monetary) benefits, employers would in turn save their companies funds. Furthermore, employers with retirement disability policies like that in *Kentucky Retirement* will not be forced to spend the time or money reworking their retirement policies to eliminate pension eligibility as a factor—pension eligibility can now be freely used.

226. *Id.* While the recession began in December 2007, it was not announced until December 2008. Abate, *supra* note 194. Furthermore, many economists believe that the current downturn is the worst it has been since the recession of 1980-1982. *Id.* Many economists attest that this current economic crisis is a direct result of the “housing market collapse and the resulting global credit crisis [which] have eroded household wealth, causing sharp cut backs in spending and severely depressing demand.” Mutikani, *supra* note 225.

227. Mutikani, *supra* note 225.

228. *Id.*

229. Brief for the States of Michigan et al. as Amici Curiae Supporting Petitioners at 12, Ky. Ret. Sys. v. EEOC, 128 S. Ct. 2361 (2008) (No. 06-1037).

3. Formulation of Future Retirement Plans

The amici curiae in support of Kentucky Retirement Systems urged that invalidating the Plan “could have substantially adverse implications for the retirement system of many States that have retirement statutes.”²³⁰ The National Association of State Retirement Administrators (NASRA), one association that filed a brief as amicus curiae in support of Kentucky Retirement Systems, noted that twenty-five million people currently rely on existing retirement plans.²³¹ They further argued that a change in retirement eligibility and/or benefit amounts would result in exorbitantly large payments that could endanger the retirement industry.²³² Thus, NASRA feared that if retirement policies had to be altered in order to provide more money or benefits to certain individuals, with so many people covered by those retirement policies, the retirement industry would no longer be able to afford to provide the benefits promised to policyholders. Similarly, with the amount of money the retirement industry would have to reallocate, retirement policies would have to be completely restructured in order to accommodate those individuals that, according to a potential ruling in favor of the EEOC, were being discriminated against in the retirement policies. However, because the Court ruled in favor of Kentucky Retirement Systems, states and companies no longer have to worry about restructuring their retirement policies. The amici curiae in support of Kentucky Retirement Systems will be able to keep their existing plans and policies in tact, as well as construct new future policies using age as a factor, so long as other factors are used as well.

230. *Id.* at 10.

231. Brief of the National Ass’n of State Retirement Administrators, et al. as Amici Curiae Supporting Petitioners at 4, *Ky. Ret. Sys. v. EEOC*, 128 S. Ct. 2361 (2008) (No. 06-1037).

232. *Id.* NASRA believe that a ruling in favor of EEOC, the respondent, would in this case force companies and states to reorganize retirement policies. *See id.* Similarly, a ruling for EEOC would require employers to increase benefits to some while leaving the benefits of others as they currently stand. *See id.* Because of the number of high number of policies currently in existence in the United States, the NASRA claims that this reorganization would cause irreparable damage the retirement industry. *See id.*

Additionally, the thirteen states²³³ that jointly filed a brief as amicus curiae in support of Kentucky Retirement Systems feared that if the Court had ruled in favor of the EEOC and invalidated the Plan, the other states would be similarly forced to change their statutory and constitutional frameworks to comply with the Court's interpretation of the ADEA.²³⁴ The ruling in *Kentucky Retirement*, however, allows those amici curiae states to maintain their current statutory and constitutional frameworks as well as alter those frameworks in the future to include age as a factor for determining benefits or policy eligibility, so long as age is not the sole factor. Consequently, the holding in *Kentucky Retirement* will save employers in countless states the time and effort of reworking their retirement plans. Additionally, in those states that do not have retirement policies similar to the one in Kentucky, should they wish to alter their retirement policies in the future, they will be free to do so using age as a factor in determining pension eligibility.

C. Impact on the United States Judicial System

As Justice Kennedy notes, “[t]he Court today undercuts [the] basic framework” for analyzing claims of ADEA violations.²³⁵ After the Court's ruling in *Smith*, disparate impact once again became an available option for ADEA claims. Following the Court's decision in *Kentucky Retirement*, however, disparate impact appears to once again be displaced. In his dissent, Justice Kennedy writes, “[d]isparate treatment on the basis of age is prohibited unless some exemption or defense provided in the Act applies.”²³⁶ Thus,

233. The thirteen states include: Michigan, Alaska, Arkansas, Colorado, Delaware, Idaho, Maryland, Minnesota, New Mexico, Oklahoma, South Carolina, Tennessee, and Texas. Brief for the States of Michigan et al. as Amici Curiae Supporting Petitioners at 10, *Kentucky Ret. Sys. v. EEOC*, 128 S. Ct. 2361 (2008) (No. 06-1037).

234. Brief for the States of Michigan et al. as Amici Curiae Supporting Petitioners at 10, *Ky. Ret. Sys. v. EEOC*, 128 S. Ct. 2361 (2008) (No. 06-1037). The aforementioned mentioned states largely have this fear because if the Court had ruled in favor of the EEOC and struck down Kentucky's retirement system as a violation of the ADEA, those states would no longer be able to use age as a factor in providing retirement. *Id.*

235. *Ky. Ret.*, 128 S. Ct. at 2371 (Kennedy, J., dissenting).

236. *Id.* at 2371.

employers should not be entitled to treat employees differently on the basis of age, unless the ADEA allows it.

In *Kentucky Retirement*, the policy in question does treat older employees differently than younger employees.²³⁷ In upholding that policy, the Court's ruling overlooks precedent and the plain text of the ADEA to find that a facially discriminatory policy is not enough to prove an ADEA violation. Rather, some discriminatory motive or intent *must* be identified. However, "[b]y embracing the approach rejected by the en banc panel and all other Courts of Appeals that have addressed this issue, this Court creates unevenness in administration, unpredictability in litigation, and uncertainty as to employee rights once thought well settled."²³⁸ Based on the Court's holding in *Kentucky Retirement*, future courts will be uncertain as to what theory of liability to apply—disparate impact or disparate treatment. *Kentucky Retirement* was an opportunity for the Court to settle precedent and end the confusion among lower courts as to which theory applies to claims of ADEA violations. Rather than clarify the issue, however, the Court has encumbered the issue further.

With regard to the potential applicability of a disparate impact theory, the holding in *Kentucky Retirement* appears to contradict both *Hazen Paper* and *Smith*, a contradiction that will undoubtedly confuse lower courts' decision-making as to whether a violation of the ADEA occurred. In *Hazen Paper*, the Court employed a disparate treatment theory of liability in issuing its ruling but also noted: "we have never decided whether a disparate impact theory of liability is available under the ADEA and we need not do so here."²³⁹ Thus, following the Court's ruling in *Hazen Paper*, the possibility of a disparate impact theory being employed to assess an alleged violation of the ADEA still existed. Similarly, in *Smith*, the Court found that "there [was] nothing in [its] opinion in *Hazen Paper* that

237. See *id.* at 2365. The Kentucky Retirement Plan "permits those who become seriously disabled but have not otherwise become eligible for retirement to retire immediately and receive 'disability retirement' benefits." *Id.* at 2364. However, if an employee becomes disabled *after* becoming eligible to receive his pension, he will not get the same "disability retirement" benefits as younger, non-pension eligible employees. See *id.* at 2364-65.

238. *Id.* at 2372 (Kennedy, J., dissenting).

239. *Hazen Paper*, 507 U.S. at 610 (citation omitted).

preclude[d] an interpretation of the ADEA that parallels [the] holding in *Griggs*.”²⁴⁰ Furthermore, the Court stated: “[W]e think the history of the enactment of the ADEA, with particular reference to the Wirtz Report, supports the pre-*Hazen Paper* consensus concerning disparate-impact liability.”²⁴¹ In *Kentucky Retirement*, however, the Court was faced with a statute that was facially discriminatory and failed to find a violation of the ADEA.²⁴² This failure demonstrates the Court’s apparent belief that a disparate impact theory is not available for claims of an ADEA violation. By failing to allow a disparate impact theory of analysis, the Court controverts its own established precedent and blazes a befuddling trail for subsequent lower courts facing alleged ADEA violations to follow.

The majority, in recognizing the confusion it created through its ruling, attempts to limit its holding.²⁴³ However, “it does so in ways not permitted by statute or . . . previous employment discrimination cases.”²⁴⁴ In *Kentucky Retirement*, the majority asserts that the policy is *not* facially discriminatory because “age is not the sole determining factor of pension eligibility,” but rather is one of many factors contributing to the determination.²⁴⁵ In drawing this distinction, the majority contradicts prior ADEA cases, since no prior ADEA case has ever suggested “that discrimination based on a protected trait is permissible if the protected trait is one among many variables.”²⁴⁶ This contradiction will undoubtedly make it difficult for future courts addressing claims of ADEA violations to know how

240. *Smith*, 544 U.S. at 238. The Court in *Griggs* followed a disparate impact theory of liability. *Griggs*, 401 U.S. at 430.

241. *Smith*, 544 U.S. at 238.

242. Under the disparate impact theory of liability, a facially discriminatory statute would violate the ADEA. *Hazen Paper*, 507 U.S. at 609. Similarly, no proof of a discriminatory motive or intent is required. *Id.*

243. *Ky. Ret.*, 128 S. Ct. at 2376 (Kennedy, J., dissenting). Justice Kennedy writes in his dissent that “[t]he Court recognizes some of the difficulties with its position and seeks to limit its holding.” *Id.* (Kennedy, J., dissenting).

244. *Id.* (Kennedy, J., dissenting).

245. *Id.* (Kennedy, J., dissenting).

246. *Id.* (Kennedy, J., dissenting). Additionally, Justice Kennedy notes that the Court’s limited holding contradicts Title VII jurisprudence since there is no indication in Title VII precedent that indicates it would be permissible for an employer to discriminate based on age so long as age is not the only factor used in determining benefits. *See id.* (Kennedy, J., dissenting).

to apply this limited holding. Likewise, subsequent lower courts will be uncertain when it comes to analyzing claims of ADEA violations that involve employment policies and practices that use age as a factor in determining benefits when age is only one of a number of factors.

VI. CONCLUSION

In *Kentucky Retirement*, the Court employed a disparate treatment theory of liability to find that, because Kentucky did not *intend* for its retirement system to discriminate against older workers, the Plan did not violate the ADEA.²⁴⁷ Furthermore, the Court added that because age was just one factor in determining pension eligibility, it could not be asserted that the policy was “‘actually motivated’ by age.”²⁴⁸ In its use of a disparate treatment theory of liability when age is used as a factor in determining benefits for older employees, the Court in *Kentucky Retirement* cast serious doubt about when and where a disparate impact theory of liability can be applied. Writing for the majority, Justice Breyer attempts to assert that the decision in *Kentucky Retirement* in no way affects the application of a disparate impact theory since Kentucky’s retirement system is not facially discriminatory.²⁴⁹ Justice Kennedy, however, disagrees and believes that the Plan is facially discriminatory.²⁵⁰ He warns that by not employing the disparate impact theory of liability, the majority in *Kentucky Retirement* has set dangerous precedent for future cases involving violations of the ADEA in which a disparate impact theory will no longer be available to employees seeking to prove a violation.²⁵¹

247. *Id.* at 2369-70.

248. *Id.* at 2370.

249. *Id.* at 2370. Justice Breyer believes that because age is only one factor in determining pension eligibility and not the *only* factor, Kentucky’s retirement system is not facially discriminatory. *Id.*

250. *See id.* at 2371-72 (Kennedy, J., dissenting). Justice Kennedy believes that whenever a policy or retirement system treats older workers and younger workers differently, that policy or system is not facially neutral. *See id.* at 2371. (Kennedy, J., dissenting). Further, he asserts that whenever age is used as a factor in determining benefits, regardless of how many other factors are used, the ADEA is violated. *Id.* at 2376 (Kennedy, J., dissenting).

251. *See id.* at 2371-77 (Kennedy, J., dissenting).

Balancing the impact the *Kentucky Retirement* holding will have on United States employers with the impact it will have on United States employees really involves the balancing of two much more meaningful elements: money and employee rights, specifically those of older employees. The holding here represents a victory for employers and their finances while conjointly demonstrating a clear lack of regard for the ADEA and the older employees the ADEA was enacted to protect.²⁵²

During this time of economic crisis, is it any surprise the Court ruled as it did? With countless companies filing for bankruptcy and even more reporting shockingly low fourth quarter earnings, the Supreme Court likely did not want to place any more financial strain or burden on companies and their respective retirement plans.²⁵³ While the Supreme Court undoubtedly had the best of intentions, Justice Kennedy noted in his dissenting opinion that, regardless of the majority's intentions, "[t]he Court today ignores established rules for interpreting and enforcing one of the most important statutes Congress has enacted to protect the Nation's work force from age discrimination."²⁵⁴ In interpreting the ADEA as it did, the Supreme Court allows employers to discriminate based on age under the guise of "pension status." Should those employees who chose to work passed the age of retirement eligibility be punished for that decision? Should they have a statute designed to protect them construed against them?

Regardless of the nation's current economic state, the rights guaranteed to all older United States employees should not be denigrated simply because enforcing those rights would be detrimental to companies and their respective retirement policies.²⁵⁵ The rights held by every United State citizen—of every age—guaranteed by the Constitution, Title VII of the Civil Rights Act of 1964, and even the ADEA are paramount to all else and should be protected as such. The right to be free of age discrimination in the workplace as granted by the ADEA is particularly important because

252. See Cozza, *supra* note 1.

253. See Mutikani, *supra* note 225.

254. *Ky. Ret.*, 128 S. Ct. at 2371 (Kennedy, J., dissenting).

255. See Brief of the National Ass'n of State Retirement Administrators, et al. as Amici Curiae Supporting Petitioners at 4, *Kentucky Retirement Systems v. EEOC*, 128 S. Ct. 2361 (2008) (No. 06-1037).

it is a right that will benefit the vast majority of working Americans at some point during their lifetimes. This right against age discrimination is one the Court should strive to protect by strictly adhering to the language of the ADEA as dictated by precedent²⁵⁶ and as advocated by Justice Kennedy and his fellow dissenting Justices.²⁵⁷

256. See *Smith*, 544 U.S. at 238 (advocating the applicability of a disparate impact theory for claims of ADEA violations).

257. See *Ky. Ret.*, 128 S. Ct. at 2371-72 (Kennedy, J., dissenting).